01-9192

(1)

No. _____

Supreme Court, U.S.
FILED
MAY 8 2002
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2001

BLAYDE GRAYSON,

Petitioner,

vs.

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

THIS IS A DEATH PENALTY CASE

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QUESTIONS PRESENTED

1. Is the Sixth Amendment right to counsel violated where police delay a formal charge to prevent appointment of counsel, where the accused is in continuous custody on an unrelated charge which is merely a pretext for arrest for the uncharged crime, and a confession is obtained after the point when right to counsel functionally attached?

2. Did the sentencing phase instructions violate the Eighth Amendment by failing to limit the jury's ability to impose a sentence of death as required by Tison v. Arizona?

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The petitioner, Blayde Grayson, prays for a writ of certiorari to review the judgment of the Supreme Court of Mississippi affirming his conviction of capital murder and sentence of death.

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported at Grayson v. State, 806 So.2d 241 (Miss. 2001); The opinion is attached as Appendix "A" to this Petition.

JURISDICTION

The state court affirmed the death sentence November 8, 2001; a timely petition for rehearing was denied February 7, 2002. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257 on the ground that a right or privilege of the defendant which is claimed under the

Constitution of the United States has been denied by the State of Mississippi.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following provisions of the United States Constitution:

The Fifth Amendment to the Constitution of the United States, which provides, in pertinent part, that:

> No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ....

The Sixth Amendment to the Constitution of the United States, which provides, in pertinent part, that:

> In all criminal prosecutions, the accused shall enjoy the right to... have the Assistance of Counsel for his defence.

The Eighth Amendment to the Constitution of the United States, which provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States which provides, in pertinent part, that:

> No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Blayde Grayson was convicted of capital murder and sentenced to death by a jury in the Circuit Court of George County, Mississippi. In affirming the conviction and sentence, the Mississippi Supreme Court held that Mr. Grayson's Sixth Amendment rights were not violated where he was purportedly held on a parole violation and was denied an initial appearance on a murder charge until after he confessed to the murder. No parole revocation was ever held. The Court held Mississippi's death penalty statute constitutional as applied to felony capital murder, where jury instructions allowed the imposition of death if Mr. Grayson merely contemplated that lethal force would be used in the commission of a felony.

REASONS FOR GRANTING THE WRIT

I

THE STATE OF MISSISSIPPI VIOLATED MR. GRAYSON'S SIXTH AMENDMENT RIGHT TO COUNSEL BY DELAYING A FORMAL CHARGE FOR THE PURPOSE OF OBTAINING AN UNCOUNSELED CONFESSION

The following facts were noted by the Mississippi Supreme Court. On May 5, 1996, police in George County, Mississippi found that Minnie Smith had been stabbed to death in her home during the course of a burglary. After interviewing neighbors, the police identified Blayde Grayson as their prime suspect. In 1995, Grayson had pled guilty to grand larceny and receiving stolen goods in connection with incidents near Ms. Smith's home. He had been sentenced to two three-year terms to be served concurrently at the MDOC Restitution Center in neighboring Jackson County. A warrant was issued for Grayson's arrest in January, 1996 for parole violation, alleging that he walked off of a work detail. Grayson v. State, 806 So.2d 241, 244-245 (Miss. 2001).

Soon after the murder of Minnie Smith in May, 1996, Sheriff George Miller of George County, Mississippi contacted law enforcement officials in Florida in an attempt to locate Grayson. He learned that Grayson was also wanted in Florida in connection with armed robberies committed in May of 1996. On May 17, 1996, officers from Escambia County, Florida contacted Miller to inform him that Grayson was in their custody. Sheriff Miller, along with three other officers, traveled to Florida to question Grayson about the Smith murder. Id.

When George County officers questioned Mr. Grayson in Florida, they considered him a suspect in the murder and testifed that they wanted to question him specifically about the murder. (T. 175) The only reason for the officers' trip to Escambia County, Florida was to investigate the Smith murder. (T. 236) The George County officers did not travel to Florida in response to any request by Mr. Grayson to talk with them, but were already in Florida, searching the home where Mr. Grayson was arrested, when they were allegedly told by Escambia County officials that Mr. Grayson would speak with them. (T. 199)

During the interview with George County officers, Mr. Grayson indicated clearly that he did not want to talk with the George County officers, and would not talk with them until he discussed the situation with his attorney. The Sheriff acknowledged that Mr. Grayson asked for a lawyer four times before the interview ended. (T. 179) After the interview ended on the evening of May 17, 1996, Sheriff Miller immediately transported Grayson back to George County, Mississippi. (T. 181)

Throughout the period from May 18 at least to May 27, Mr. Grayson was kept on "jail watch," where jailers checked on him every 15 minutes, entering the cell any time they observed him sleeping and frequently waking him. (T. 228, 286) On Monday, May 20, Miller sought and

received a judicial order to obtain blood and tissue samples from Grayson. The order was styled "in the Matter of the Investigation of the murder of Minnie Smith." (T. 182-184)

On Tuesday, May 21, Mr. Grayson allegedly contacted the Sheriff, and at some point after that a statement was obtained from him where he named another individual as the killer but implicated himself in the crime. (T. 184) After this statement was taken, law enforcement declined to charge Mr. Grayson in connection with the crime, even though they had at least enough evidence to charge him as an accessory after the fact. The Sheriff testifed that they did not charge Mr. Grayson because there was more investigation to be done. (T. 185) After giving his first statement implicating his friend on May 21, Mr. Grayson accompanied George County law enforcement back to Florida to show them physical evidence implicating his friend. (T. 186)

On Thursday, May 23, Mr. Grayson gave a written statement again implicating his friend. (T. 188) At the conclusion of this interview, an investigator asked him to take a polygraph test. (T. 189). Mr. Grayson was transported to Jackson to take the polygraph test on May 24. (T. 189) During administration of the polygraph, the officer administering the test confronted Mr. Grayson, saying he was not being truthful. He did not tell Mr. Grayson that the test would not be admissible in court. See Humphrey v. State, 759 So.2d 368 (Miss. 2000). Mr. Grayson then changed his story and confessed to the killing. (T. 309-310) A call was made to the Sheriff in George County, who immediately signed the charges against Mr. Grayson. (T. 225)

After being transported to George County on May 18, Mr. Grayson never received a preliminary revocation hearing on the probation violation charge[1], and did not receive an initial appearance on the murder until he was formally charged on May 24. There was a justice court

[1] Gagnon v. Scarpelli, 411 U.S. 778 (1973) (A probationer is entitled to both a preliminary and final revocation

judge available continuously from May 20 through May 24. (T. 227) Mr. Grayson was not provided with an attorney at any time between May 18 and May 24. At no time did officers ask if he had obtained his own counsel, and at no time did officers attempt to contact counsel for him.

Mr. Grayson's confession was admitted at trial, after the trial court ruled it admissible at a pretrial suppression hearing. Mr. Grayson was convicted on August 7, 1996 and sentenced to death by lethal injection.

While avoiding the question of whether Mr. Grayon's Sixth Amendment right to counsel had attached at the time of his first statement, the Mississippi Supreme Court affirmed the trial court's admission of the resulting confession on finding that the George County officers had ceased their initial interrogation based on Mr. Grayon's request for counsel, and that Mr. Grayson had waived whatever right to counsel may have attached at the time of his statements by re-initiating contact with law enforcement and by signing a waiver of his rights. Grayson v. State, 806 So.2d 241, 248 (Miss. 2001). This was error in that Mr. Grayson's Sixth Amendment rights attached before he allegedly re-initiated contact with police, as Mr. Grayson's transfer to Mississippi under the revocation warrant was actually a pretext for an arrest on the murder charge, and he was denied an initial appearance and the opportunity to have appointed counsel on the murder charge.

Officers' testimony indicates they had no intention of charging Mr. Grayson with any crime until they had enough evidence to establish him as the sole killer rather than a mere participant in the crime, as they refused to charge him with anything after he gave an inculpatory

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hearing under the conditions specified in Morrissey v. Brewer, 408 U.S. 471 (1972)).

statement placing him at the scene of the crime during its commission. (T. 185). This had the effect of denying Mr. Grayson an initial appearance and corresponding appointment of counsel on the murder charge. Further, they had no intention, at any point during their proceedings, of providing Mr. Grayson with an attorney, which he requested at his initial interrogation.

Under the situation created and controlled by George County law enforcement, Mr. Grayson was barred from access to an attorney until after he confessed. Under the holding of the Mississippi Supreme Court, Mr. Grayson could have been held indefinitely without counsel, knowing that he was being vigorously investigated on the murder charge, subject to coercive methods such as sleep deprivation and extraction of tissue samples, until he contacted police in an effort to defend himself by providing information.

While affirming that Mr. Grayson had waived any rights which might have attached, the Mississippi Supreme Court failed to properly reach the question of whether Mr. Grayson's Sixth Amendment right to counsel had attached at the time he made his statement, although the court implies that Mr. Grayson's rights had not attached because he had not been formally arrested on the murder charge, which was the basis for the trial court's finding that the Sixth Amendment right to counsel had not attached with respect to the murder charge. The Court's failure to reach the issue warrants reversal, where Mr. Grayson's Sixth Amendment right to counsel had attached at the time of his statement, and that right was violated.

A. Mr. Grayson's right to counsel had attached at the time he gave statements to law enforcement.

The right to counsel attaches at any "critical stage" in a criminal prosecution. United

States v. Massiah, 377 U.S. 201 (1964). This Court has long recognized the critical nature of the right to counsel during the early stages of a prosecution, even before the prosecution takes on "formal" characteristics, in particular where the State seeks to abuse its custodial power. United States v. Wade, 388 U.S. 218 (1967) is on point:

> Today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings....The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful defense. Wade, 388 U.S. at 224
>
> In Escobedo v. State of Illinois, we drew upon the rationale of Hamilton and Massiah in holding that the right to counsel was guaranteed at the point where the accused, prior to arraignment, was subjected to secret interrogation despite repeated requests to see his lawyer. We again noted the necessity of counsel's presence if the accused was to have a fair opportunity to present a defense at the trial itself: 'The rule sought by the State here....would make the trial no more than an appeal from the interrogation.' (Wade, 388 U.S. at 225-226, quoting Escobedo, 378 U.S. at 487-488)
>
> "The accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, *formal or informal*, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."
>
> Wade, 388 U.S. at 226. (emphasis added)

As a matter of state law, the Sixth Amendment right to counsel attaches "at the time the Initial Appearance under Rule 1.04 [now Rule 6.03] ... *ought to have been held. ...*" ." Page v. State, 495 So.2d 436, 439 (Miss. 1986), (emphasis in original). Under the Mississippi rules, a

person arrested without a warrant should be taken "forthwith" before a magistrate. Abram v. State, 606 So.2d 1015, 1029 (1992). The purpose of this rule is in part to advise the defendant of his right to appointment of counsel and his right to communicate with counsel. Id. One of the most important safeguards provided by a prompt initial appearance is that a defendant is advised of his right to counsel by a neutral magistrate, who has no interest in exacting from him a waiver of his right to counsel. See Nicholson v. State, 523 So.2d 68 (Miss. 1988) (Robertson, J., concurring). The initial appearance must be held as soon as custody, booking, administrative and security needs have been met. Id. The Mississippi case of Swinney v. State illustrates impermissible reasons for delaying an initial appearance, and is particularly relevant here. In Swinney the Mississippi Supreme Court found the defendant's initial appearance was unnecessarily delayed, even though it occurred within 48 hours of arrest, where investigators took the defendant's statement, and then confronted her with discrepancies, while at the same time delaying the initial appearance and thereby denying her access to counsel, under the guise of investigating which charges to bring against her. Swinney v. State, 2001 WL 204032 (Miss.)

B. At the time he gave his first statement to George County law enforcement regarding the murder, Mr. Grayson had been under arrest on the murder charge for over three days.

In reviewing the trial court decision, the Mississippi Supreme Court failed to correct the erroneous finding that Grayson's right to counsel had not attached at the time he made statements to law enforcement because he had not been formally arrested on that charge. Although the Court acknowledged that under the Mississippi constitution, rights parallel to the Sixth Amendment right to counsel attach when the police move from an investigatory phase to an accusatory phase, such that a suspect has a right to an attorney at the time of his arrest, the Court

agreed with the trial court that Grayson had not been arrested on the murder charge. The Court was unresponsive to Mr. Grayson's argument that his right to counsel had nevertheless attached.

Contrary to the trial court's findings, Grayson had been "functionally" arrested in accordance with Mississippi law at the time of his statement, and his Sixth Amendment rights were violated in that he was denied a timely initial appearance and was thereby impermissibly denied counsel. See Abram, 606 So.2d at 1029. The Mississippi case of Abram v. State is entirely on point in establishing that Mr. Grayson had been functionally arrested on the murder charge under Mississippi law, which has the same Sixth Amendment implications as a formal arrest. See Abram, supra. The relevant facts surrounding the "arrest" and confession in Abram were almost identical to the Grayson facts. Like Grayson, Abram was the suspect in a murder investigation but was purportedly being held on an unrelated charge. The Mississippi Supreme Court found that Abram was "functionally arrested" without a warrant, was questioned for three days, and was not given an initial appearance on the murder charge until immediately after he confessed. That Court went on to hold that there was no excuse for the delay in giving the defendant an initial appearance on the murder charge and providing him access to counsel, as the judge had been available to conduct the appearance from the time Abram was taken into custody. The Court said,

> "There was an obvious and deliberate attempt by the authorities in charge to manipulate the system and deny Abram its benefits until a confession was obtained. The failure to provide Abram with an initial appearance sooner had devastating consequences for the defense, clearly derogating from his right to a fair trial. Common sense suggests that law enforcement authorities would never have obtained an uncounseled confession from Abram had he been given an initial appearance, and consequently, access to counsel, without unnecessary delay. We hold the failure to provide the

> initial appearance reversible since, as a consequence, Abram gave a confession in the absence of, and in violation of, his right to counsel. Such an error could hardly be deemed harmless since the conviction of Abram for capital murder was based entirely on his confession."

Abram, 606 So.2d at 1029. Like Abram,

1. Grayson was in custody on another charge. (He was purportedly transported from Florida to Mississippi on a revocation warrant.)
2. The state needed a confession from Grayson to make their case.
3. The state withheld serving the arrest warrant until after a confession was obtained.
4. The state withheld Grayson's initial appearance until after a confession was obtained and he was officially arrested, such that he was unable to obtain counsel for the murder charge during questioning.
5. Grayson had been appointed counsel on a previous charge to whom he was denied access during his questioning about the murder. (The trial court held that Grayson had no right to call the public defender who had defended him on the charge underlying his revocation. [2])
6. The state manipulated the fact that Grayson was in custody on the other charge, such that he could have been subject to custodial questioning for an indefinite period of time about the murder, without counsel, until he confessed.

Based on these facts, Grayson *was* under arrest on the murder charge when he gave his

[2] In reviewing this finding, the Mississippi Supreme Court misstates the law on the right to counsel for parole and probation violations. Rather than a per se rule of no right to counsel for parole or probation revocation proceedings, state law and the Constitution of the United States require a case by case determination. Riely v. State, 562 So.2d 1206 (Miss. 1990); Gagnon v. Scarpelli, 411 U.S. 778 (1973).

statements, and his right to counsel had therefore attached.

C. Grayson was entitled to the assistance of counsel on the murder charge within 48 hours of his transfer from Florida to Mississippi, where the sole purpose of his transfer was to establish Grayson as the perpetrator in the murder.

As stated earlier, law enforcement went to Florida for the sole purpose of questioning Mr. Grayson about the murder of Minnie Smith, and transported him back to Mississippi immediately after questioning him. (T. 181) Arguably, George County officials would not have sought Mr. Grayson and transported him back to Mississippi solely on the revocation warrant, as that warrant had been outstanding since January of the same year, and the Sheriff contacted Florida officials to try to locate Mr. Grayson only after he was named a suspect in the Smith murder, in May. Clearly Mr. Grayson was transported to George County for the sole purpose of prosecuting him for the murder of Minnie Smith.

Had Mr. Grayson been initially arrested (off the street) without a warrant on suspicion of murder, he would have had limited exposure to law enforcement tactics designed to extract a confession. See Riverside v. McLaughlin, 500 U.S. 44 (1991) (Constitution requires probable cause hearing before neutral magistrate within 48 hours of arrest without warrant). As stated earlier, this 48-hour requirement is not simply a safeguard against confining innocent persons in jail for an unreasonable period. By providing a probable cause hearing and access to appointed counsel as soon as administratively possible, this rule protects citizens from being worn down by police questioning and/or harassment and effectively coerced into incriminating themselves. Abram, 606 So.2d at 1029; Nicholson v. State, 523 So.2d 68, 77 (Miss. 1988). It also protects citizens from having their probable cause determinations delayed while police gather additional

evidence to justify their arrest. Riverside, 500 U.S. at 56. However because Grayson was already in custody for another charge, the State could deny the existence of any limit on Grayson's exposure to such tactics. Where the State has targeted an individual as the perpetrator on a specific charge, but is clearly taking advantage of incidental custody to delay a formal charge and improve their case against that individual without the interference of counsel, the Constitution demands a safeguard comparable to the 48-hour initial appearance rule. The protections of Miranda[3] are an insufficient replacement for the Sixth Amendment right to counsel in this context. Were Miranda sufficient to protect citizens against unfair police tactics during prolonged custody, there would be no 48-hour rule for initial arrests.

D. The waiver on which the Mississippi Supreme Court relied in finding no violation of Grayson's Sixth Amendment right to counsel was ineffective, in that the State wrongfully withheld Grayson's initial appearance on the murder charge.

As in Abram, Grayson's signed waivers of right to counsel were ineffective because of the State's misconduct in withholding his initial appearance, where the defendant was functionally under arrest for the murder charge, and his right to counsel had attached but was eviscerated by the State's refusal to recognize it. See Abram, supra. The State's intent to withhold an initial appearance until after a confession was obtained is evident in its decision not to charge Mr. Grayson with any crime based on his first inculpatory statement. (T. 185) By delaying a formal arrest until a confession was obtained, law enforcement blocked Grayson's access to appointed counsel which he would have obtained at an initial appearance.

Moreover, Mr. Grayson's subsequent statements were made inadmissible when George

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

County law enforcement refused to honor Mr. Grayson's request for counsel during custodial questioning. See Edwards v. Arizona, 451 U.S. 477 (1981); Duplantis v. State, 644 So.2d 1235 (1994). Law enforcement from George County, Mississippi traveled to Escambia County, Florida, where Mr. Grayson was held on another matter, to question him about the Smith murder. Mr. Grayson told the officers unequivocally that he did not want to speak with them there, and would only speak with them in George County with his attorney present. (T. 176-178) In fact, Grayson was forced to request counsel multiple times during that conversation, as the officers refused to end questioning after he invoked his rights. The George County Sheriff testified as follows regarding the initial interview with Mr. Grayson in Florida:

Q: Now I'm going to begin shortly before that – if you would look up – this line right here – prior to your interrogation – would you read the line stated by Mr. Blayde Grayson, sir? It begins "No, sir."
A: No, sir, I'd rather not until I talk to my lawyer.
Q: All right. Now, that is about – what – about a quarter of the way into the interview?
A: Yes, sir.
Q: And he tells you at that point he wants to talk to his lawyer?
A: Yes, sir.
Q: All right. Now did you continue to question him after that, Sheriff?
A: Yes, sir.

(T. 176-177) By ignoring Mr. Grayson's invocation of his right to counsel, George County officials violated Grayson's rights under Edwards, and any subsequent waivers were made ineffective, including any contact Grayson might have initiated with law enforcement. See Edwards v. Arizona, 451 U.S. 477 (1981); Duplantis v. State, 644 So.2d 1235 (1994).

Thus Mr. Grayson was denied his constitutional right to be free of interrogation without requested counsel, and was denied his Sixth Amendment right to counsel which attached no later

than 48 hours after he was transported to Mississippi to face prosecution for the murder charge. As a result he gave an uncounseled statement which resulted in a conviction and sentence of death. As the Mississippi Supreme Court denied that Mr. Grayson was functionally under arrest on the murder charge and ignored the State's willful abuse of the system in delaying an initial appearance and appointment of counsel on the murder charge until a confession was obtained, the Mississippi Supreme Court failed to properly reach the Sixth Amendment issues in this case. This error warrants reversal.

II

THE STATE OF MISSISSIPPI VIOLATED MR. GRAYSON'S EIGHTH AMENDMENT RIGHTS BY IMPOSING A SENTENCE OF DEATH BASED ON JURY INSTRUCTIONS WHICH WERE CONSTITUTIONALLY DEFECTIVE IN LIGHT OF TISON V ARIZONA

The Mississippi Supreme Court failed to apply the rule announced in Enmund v. Florida and clarified in Tison v. Arizona in its review of Mississippi's death penalty statute as applied to felony capital murder, and of the jury instructions used at Grayson's trial and sentencing which were based thereon. The resulting affirmance is in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. See Enmund, 458 U.S. 782 (1982); Tison, 481 U.S. 137 (1987).

At Mr. Grayson's trial, the jury was instructed that they could find Mr. Grayson guilty of capital murder based on Mississippi Code Section 97-3-19 (e), which automatically elevates a killing which takes place during the commission of a felony to capital murder for which death may be imposed. At sentencing, the jury was instructed according to Mississippi Code Sections

99-19-101(5)(d), which allows the commission of a felony to be used as an aggravator justifying the imposition of death, and Mississippi Code Section 99-19-101(7), which outlines the level of culpability necessary to impose death under Mississippi law. Taken as a whole, the jury instructions violated this Court's Eighth Amendment jurisprudence regarding permissible imposition of a death sentence.

The Grayson court held constitutionally sound Mississippi Code Section 97-3-19(e), which automatically elevates a killing which takes place during the commission of a felony to capital murder for which death may be imposed. Grayson v. State, 806 So.2d 241, 252 (Miss. 2001). In so holding the court cites archaic, pre-Enmund rationale which is in direct conflict with this Court's decisions on the level of culpability required for a sentence of death. The lower court, recognizing that only 0.5% of robberies result in homicide, accepted that it cannot be said the robber in every case intends to kill. Grayson, 806 So.2d at 252, quoting Culberson v. State, 379 So.2d 499, 507 (Miss. 1979). The court then justified the use of the death penalty in such cases where intent to kill is absent:

> [B]ut we think it overlooks the great danger the aggressor willfully imposes upon his victim. The constituent crime with its hazardous potential is that which the legislature intended to deter by permitting capital punishment if death results from the felonious undertaking.

Id. Mississippi's current jurisprudence, as evidenced by the Grayson opinion, equates felony participation with the level of culpability required to impose the death penalty. Where Mississippi holds, either explicitly or implicitly, that anyone who commits a felony during which a person dies *has contemplated that lethal force would be used and is therefore death eligible*, it is acting in violation of the United States constitution and this Court's Eighth Amendment

jurisprudence. See Enmund, 458 U.S. 782 (1982); Tison, 481 U.S. 137 (1987).

The Mississippi court also held sound Mississippi Code Section 99-19-101(5)(d), which allows the commission of a felony to be used as an aggravator justifying the imposition of death. Grayson, 806 So.2d at 252. The Court notes that Mississippi law is valid because the preceding section, along with Mississippi Code Section 99-19-101(7), substantially limits the class of individuals who can receive the death penalty. Id. Although that is a questionable holding in itself, more importantly the Court failed to apply Tison in evaluating the sufficiency of Section 99-19-101(7). *Miss. Code Ann. § 99-19-101(7)* reads in pertinent part:

> (7) In order to return and impose a sentence of death the jury must make a written finding of one or more of the following:
>
> (a) The defendant actually killed;
> (b) The defendant attempted to kill;
> (c) The defendant intended that a killing take place;
> (d) The defendant contemplated that lethal force would be employed.

This Court has now clarified Enmund in holding that before a defendant may be sentenced to death, a jury must find that the defendant either killed, intended to kill, attempted to kill, or as a major participant in a felony was recklessly indifferent to the killing. Tison v. Arizona, 481 U.S. 137 (1987).

The issue of intent in the Enmund holding was the source of some confusion before the Court decided Tison. In Tison, this Court addressed the Arizona Supreme Court's misinterpretation of the Enmund intent requirement:

> The Arizona Supreme Court wrote:
> "Intend to kill includes the situation in which the defendant intended, contemplated, or anticipated that lethal force

> would or might be used or that life would or might be taken in accomplishing the underlying felony."
>
> *This definition of intent is broader than that described by the Enmund Court.* Participants in violent felonies like armed robberies can frequently "anticipat[e] that lethal force...might be used...in accomplishing the underlying felony." Enmund himself may well have so anticipated. Indeed, the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; it is one principal reason that felons arm themselves. *The Arizona Supreme Court's attempted reformulation of intent to kill amounts to little more than a restatement of the felony-murder rule itself. Petitioners do not fall within the "intent to kill" category of felony murderers for which Enmund explicitly finds the death penalty permissible under the Eighth Amendment.*

Tison, 481 U.S. at 150-51. (emphasis added). In short, Tison says that where a defendant merely "Contemplated that lethal force would be used," this falls short of the required level of intent. Knowledge of foreseeable consequences is not intent. See Id. However, under its current scheme, Mississippi fails to properly instruct juries as to the level of culpability required to impose the death penalty, and impermissibly allows imposition of the death penalty upon a felon who contemplated that lethal force would be used in the commission of a crime, but was not a major participant and recklessly indifferent to the killing, in violation of the Eighth Amendment. See Id.

Further, if Mississippi holds, either explicitly or implicitly, that *by definition* anyone who commits a felony during which a person dies was *recklessly indifferent to the killing*, it is using unconstitutional means to adapt the Mississippi scheme to the Tison mandate, as it is taking a question of fact away from the jury.

To the extent that it continues to misapply Enmund by failing to follow Tison,

Mississippi is in direct conflict with the current state of Florida law. See Jackson v. State, 575 So.2d 181 (Fla. 1991) ("Mere participation in robbery that resulted in murder is not enough culpability to warrant death penalty, even if defendant anticipated that lethal force might be used, because the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen.") The Jackson court explained that a scheme which would qualify every defendant convicted of felony murder for the death penalty, based on the fact that they anticipated that lethal force might be used, would "defeat the cautious admonition of Enmund and Tison, that the constitution requires proof of culpability great enough to render the death penalty proportional punishment," and fail to "'genuinely narrow the class of persons eligible for the death penalty.'" Jackson, 575 So.2d at 193 (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)).

Mississippi Code Section 99-19-101(7) has been inconsistently interpreted by Mississippi courts in an attempt to make sense of it, and perhaps to reconcile the flawed statute with constitutional principles. In White v. State, the Court began a discussion of the section by saying "We are less than certain of the precise difference between Subsection (c), "the defendant intended that a killing take place," and Subsection (d), "the defendant contemplated that lethal force would be employed." White, 532 So.2d 1207, 1220 (Miss. 1988). In the end, after consulting a dictionary and thesaurus, the White Court concluded that "intend" and "contemplate" were distinct concepts, and that one could "contemplate" without necessarily "intending." The Court went on to re-interpret "contemplate" as used in the Mississippi statute to mean a "contingent intent," where the defendant "planned" that the use of lethal force would be substantially probable, such that mere tort foreseeability fell outside Subsection (d). White,

532 So.2d at 1220-21 (1988). This holding was recently applied by the Mississippi Supreme Court in Randall v. State, 806 So.2d 185 (2002), where the Court found that "contemplation" alone was insufficient, and that the jury had to find intent beyond mere foreseeability or reckless indifference to human life. The state court vacated the death sentences in White and Randall.

Although the White court may have attempted to cure the Mississippi statute's facial constitutional problem by redefining "contemplate," this cure is only effective where the jury is instructed that the plain language of the statute is insufficient, as Randall demonstrates. The state court reversed Randall becaise the additional limiting instruction was not given to the jury. Randall, 806 So.2d at 233. Where the relevant jury instruction consists merely of the four indicia of culpability in 99-19-107, without a limiting instruction coveyed to the jury, it is fatally flawed and requires reversal. See Clemons v. Mississippi, 494 U.S. 738 (1990).

The jury instructions used in Grayson's trial quoted Code Section 99-19-101(7), and required only that the jury find one of the four indicia of culpability, along with at least one statutory aggravating factors before it could impose the death penalty. Because the first requirement could have been met with a finding that the defendant contemplated lethal force would be used, and the second requirement could have been met with a finding that the defendant committed the felony of robbery, the jury was free to impose the death penalty without making the findings required under the United States Constitution. On this basis, the state court judgment must be vacated.

CONCLUSION

For all the foregoing reasons, this Court should grant the writ of certiorari, vacate the judgment of the Mississippi Supreme Court, and either set this case for review or summarily reverse the opinion of the state court.

Respectfully submitted,

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Supreme Court of Mississippi.

Blayde GRAYSON a/k/a Blayde N. Grayson a/k/a Blayde Nathaniel Grayson a/k/a Blayde N. Amodeo
v.
STATE of Mississippi.

No. 1998-DP-01782-SCT.

Nov. 8, 2001.
Rehearing Denied Feb. 7, 2002.

Defendant was convicted in the Circuit Court, George County, Kathy King Jackson, J., of capital murder and sentenced to death by lethal injection. Defendant appealed. The Supreme Court, Cobb, J., held that: (1) defendant failed to show that confession given after waiver of right to counsel was product of coercion; (2) defendant was not entitled to change of venue; (3) photographs of crime scene and victim were properly admitted; (4) portion of death penalty statute providing for application of death penalty to felony murder defendants is not unconstitutional; (5) venire member's comment during voir dire that defendant was mentally off was not so prejudicial as to warrant mistrial; (6) prospective jurors, who had strong reservations about imposing death penalty due to religious convictions, did not have their free exercise clause rights violated when they were struck for cause; and (7) death sentence was appropriate.

Affirmed.

West Headnotes

[1] Criminal Law ⚖517.2(2)
110k517.2(2)

Capital murder defendant waived any right to counsel he might theoretically have had at time he confessed, where police ceased their interrogation of defendant when he invoked right to counsel, defendant reinitiated communication with authorities, and defendant signed waiver of rights form prior to giving statement. U.S.C.A. Const.Amend. 6; Const. Art. 3, § 26.

[2] Criminal Law ⚖531(3)
110k531(3)

Capital murder defendant failed to show that confession given after waiver of right to counsel was product of coercion, where police interrogation in which defendant initially invoked right to counsel lasted less that four minutes, defendant was properly confined for violation of probation conditions, and defendant offered no evidence that being under jail watch had any coercive effect or that coercive tactics were used to induce him to take polygraph test. U.S.C.A. Const.Amends. 5, 6; Const. Art. 3, § 26.

[3] Criminal Law ⚖517.2(1)
110k517.2(1)

When suspect invokes his right to counsel, all interrogation must cease until lawyer is present, unless suspect himself reinitiates communication with police. U.S.C.A. Const.Amend. 6; Const. Art. 3, § 26.

[4] Criminal Law ⚖517.2(1)
110k517.2(1)

Invocation of right to counsel must be unambiguous; ambiguous mention of possibly speaking with one's attorney is insufficient to trigger right to counsel. U.S.C.A. Const.Amend. 6; Const. Art. 3, § 26.

[5] Criminal Law ⚖641.3(4)
110k641.3(4)

Rights under state constitution section providing that accused shall not be compelled to give evidence against himself attach when police move from investigatory phase to accusatory phase, rather than at actual start of adversary proceedings; thus, accused has right to attorney at time of his arrest, regardless of whether he has been arraigned or has otherwise triggered his Sixth Amendment rights. U.S.C.A. Const.Amend. 6; Const. Art. 3, § 26.

[6] Criminal Law ⚖517.2(2)
110k517.2(2)

[6] Criminal Law ⚖641.4(2)
110k641.4(2)

Where suspect voluntarily initiates contact with police, he effectively waives both his Fifth and Sixth Amendment rights. U.S.C.A. Const.Amends. 5, 6.

[7] Criminal Law ⚖517.2(2)
110k517.2(2)

When suspect voluntarily signs waiver of rights form, he waives his right to have counsel present during questioning. U.S.C.A. Const.Amend. 6; Const. Art. 3, § 26.

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Appendix "A"

[8] Criminal Law ⚖412.2(5)
110k412.2(5)

While signed waiver of rights form satisfies requirement that waiver of right to counsel be knowing and intelligent, any statements given can still be attacked on grounds that they were involuntary. U.S.C.A. Const.Amend. 6; Const. Art. 3, § 26.

[9] Criminal Law ⚖1158(4)
110k1158(4)

Trial court's finding that confession is voluntary and admissible is finding of fact which will not be reversed unless it is manifestly in error or against overwhelming weight of evidence.

[10] Criminal Law ⚖126(2)
110k126(2)

Capital murder defendant was not entitled to change of venue, where, of ten county residents subpoenaed to appear as jurors, only one resident believed defendant would be unable to get fair trial and most residents were unable to recall details of crime. West's A.M.C. § 99-15-35.

[11] Criminal Law ⚖1150
110k1150

Trial court's decision as to whether to grant change of venue is reviewed for abuse of discretion.

[12] Criminal Law ⚖134(1)
110k134(1)

Presumption upon application for change of venue that impartial jury cannot be obtained can be rebutted by state's presentation of evidence at venue hearing coupled with trial judge's reasoned sense of community and, particularly in capital murder case, awareness of uncontrovertible impact of saturation media publicity upon attitudes of community. West's A.M.C. § 99-15-35.

[13] Criminal Law ⚖134(1)
110k134(1)

In some circumstances, defendant may be entitled to irrebuttable presumption that impartial jury cannot be obtained; elements which should serve to indicate irrebuttable presumption include the following: (1) capital cases based on consideration of heightened standard of review; (2) crowds threatening violence toward defendant; and (3) inordinate amount of media coverage, particularly in cases of serious crimes against influential families or public officials, serial crimes, crimes committed by black defendant upon white victim, and where there is inexperienced trial counsel. West's A.M.C. § 99-15-35.

[14] Criminal Law ⚖126(1)
110k126(1)

Prosecution can rebut claim on application for change of venue that defendant cannot receive fair and impartial trial in particular county by demonstrating that impaneled jury members affirmatively stated that they could fairly and impartially serve as jurors. West's A.M.C. § 99-15-35.

[15] Criminal Law ⚖438(4)
110k438(4)

[15] Criminal Law ⚖438(6)
110k438(6)

Photographs of crime scene and capital murder victim were properly admitted to corroborate testimony of prosecution witnesses and to show cause of death and state of crime scene at time investigation took place.

[16] Criminal Law ⚖438(1)
110k438(1)

Admissibility of photographs rests within sound discretion of trial judge.

[17] Criminal Law ⚖438(1)
110k438(1)

[17] Criminal Law ⚖438(6)
110k438(6)

Photographs have evidentiary value where they aid in describing circumstances of killing and corpus delicti, where they describe location of body and cause of death, and where they supplement or clarify witness testimony.

[18] Sentencing and Punishment ⚖1624
350Hk1624

Portion of death penalty statute providing for application of death penalty to felony murder defendants is constitutional. West's A.M.C. § 97-3-19(2)(e).

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[19] Sentencing and Punishment ⚿1625
350Hk1625

Statute providing death penalty aggravating circumstance that capital offense was committed while defendant was engaged in felony is constitutional. West's A.M.C. § 99-19-101(5)(d).

[20] Criminal Law ⚿867
110k867

Venire member's comment during voir dire that capital murder defendant was mentally off was not so prejudicial as to warrant mistrial, where defendant failed to object to comment at time it was made, trial judge interrupted member's statement, and members were later asked whether they could be fair, to which members answered in affirmative.

[21] Criminal Law ⚿1155
110k1155

Standard of review applied to decisions of whether to grant mistrial based upon voir dire statements of potential jurors is abuse of discretion.

[22] Constitutional Law ⚿84.5(1)
92k84.5(1)

[22] Jury ⚿33(2.15)
230k33(2.15)

Prospective jurors, who had strong reservations about imposing death penalty due to religious convictions, did not have their free exercise clause rights violated when they were struck for cause in capital murder prosecution; rights of individual jurors to sit on jury panel were outweighed by state's legitimate interest in excluding jurors whose opposition to capital punishment will not allow them to view proceedings impartially. U.S.C.A. Const.Amend. 1.

[23] Costs ⚿302.2(2)
102k302.2(2)

Denial of funds for jury consultant was not abuse of discretion; although defendant made oral motion for funds, trial court delayed ruling on motion pending filing of formal motion, record contained no such motion, and issue was not raised again during trial.

[24] Costs ⚿302.3
102k302.3

Denial of funds for second private investigator was not abuse of discretion, where not all of previously approved funds for first investigator were spent and motion requesting additional funds stated that funds were needed to contact possible exculpatory witness without further information.

[25] Criminal Law ⚿1148
110k1148

Trial court's decision on motion for funding for consultants or investigators for indigent defendant is reviewed for abuse of discretion.

[26] Costs ⚿302
102k302

[26] Costs ⚿302.3
102k302.3

Accused seeking funding for consultants or investigators is required to offer concrete reasons for requiring assistance of non-legal personal, not undeveloped assertions that requested assistance would be beneficial.

[27] Homicide ⚿354(1)
203k354(1)

[27] Sentencing and Punishment ⚿1680
350Hk1680

Death sentence was appropriate in capital murder prosecution, where defendant was under sentence of imprisonment at time of murder, sentence was not disproportionate, and there was no evidence that sentence was imposed under influence of passion, prejudice, or any other arbitrary factor. West's A.M.C. § 99-19-105(3).

***244** David Michael Ishee, Pascagoula, Attorney for Appellant.

Office of the Attorney General by Marvin L. White, Jr. , Jackson, Attorney for Appellee.

EN BANC.

COBB, J., for the Court:

¶ 1. Blayde Grayson was indicted in the George County Circuit Court for capital murder, pursuant to Miss.Code Ann. § 97-3-19(2)(e) (2000), while in the commission of the crime and felony of burglary as defined by Miss.Code Ann. § 97-17-23 (2000). He

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was later convicted and sentenced to death by lethal injection. He now appeals, raising the following seven issues:

I. THE TRIAL COURT ERRED IN FAILING TO GRANT THE APPELLANT'S MOTION TO SUPPRESS STATEMENTS GIVEN TO LAW ENFORCEMENT OFFICERS.

II. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR CHANGE OF VENUE.

III. THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF PHOTOGRAPHS OF THE VICTIM AND OF THE CRIME SCENE INTO EVIDENCE.

IV. THE TRIAL COURT ERRED IN FAILING TO GRANT THE APPELLANT'S MOTION TO DECLARE MISSISSIPPI CODE SECTION 97-3-19(e) UNCONSTITUTIONAL OR IN THE ALTERNATIVE TO PRECLUDE THE PROSECUTION FROM RELYING ON MISSISSIPPI CODE ANNOTATED SECTION 99-19-101-5(d) AS AN AGGRAVATING CIRCUMSTANCE OF THE APPELLANT'S POSSIBLE CAPITAL SENTENCE TRIAL.

V. THE TRIAL COURT ERRED IN NOT GRANTING THE APPELLANT'S MOTION FOR MISTRIAL BASED ON COMMENTS MADE BY POTENTIAL JURORS DURING VOIR DIRE.

VI. THE TRIAL COURT ERRED IN STRIKING JURORS BRIDGET PHILLIPS AND BERNARD GOFF WITHOUT PROPER SHOWING THAT THE POTENTIAL JURORS COULD NOT FOLLOW THE LAW IN REGARD TO THE DEATH PENALTY.

VII. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR FUNDS FOR PRIVATE INVESTIGATOR AND JURY CONSULTANT DESPITE REPEATED REQUESTS BY THE APPELLANT.

¶ 2. Finding these issues to be without merit, we affirm.

FACTS

¶ 3. On May 5, 1996, the body of seventy-eight-year-old Minnie Smith was discovered by her son-in-law. The police investigation revealed that Smith had been stabbed to death, apparently in the course of a burglary of her home. Law enforcement officers interviewed neighbors within a radius of several miles, before eventually focusing their attention on Blayde Grayson.

¶ 4. On March 23, 1995, Grayson had pled guilty to grand larceny and to the reduced charge of knowingly receiving stolen *245 property in connection with burglaries apparently committed in the area of the Smith home. He was sentenced to two three-year terms to be served concurrently and transferred to the Mississippi Department of Corrections (MDOC) Restitution Center Program in neighboring Jackson County, with the understanding that a failure to complete the program would result in his being placed in the general MDOC population without any further orders from the court. According to documents filed with the court, Grayson later walked off of a work detail, and a warrant was issued for his arrest on January 19, 1996, for probation violation.

¶ 5. Soon after the murder, Sheriff George Miller of George County contacted law enforcement officials in Florida in an attempt to locate Grayson. [FN1] Miller soon learned that law enforcement officials in Escambia County, Florida, were also seeking Grayson in connection with three armed robberies committed in Florida in May of 1996. Sheriff Miller later indicated that Grayson became a suspect because of his prior crimes and because his home prior to incarceration was "a very short distance" from Minnie Smith's home. On May 17, 1996, the Escambia County sheriff's department called Miller to inform him that Grayson was in custody. Sheriff Miller traveled to Florida that afternoon, accompanied by Houston Door and John Miller of the Mississippi Highway Patrol and Chief Investigator Al Hillman of the George County sheriff's office. When Sheriff Miller arrived in Escambia County, he began interviewing Grayson, [FN2] after having him sign a waiver of his Miranda rights. Although he had earlier requested to speak with law enforcement personnel from George County, Grayson apparently changed his mind after Sheriff Miller began the interview. The transcript of the hearing on the motion to suppress Grayson's confession contains the following exchange:

FN1. During the hearing on the motion to suppress Grayson's confession, Miller did not elaborate on how he learned Grayson was in Florida except to say "I received some information that he was in Florida."

FN2. The record does not reveal exactly when this interview began or how long it lasted. Testimony by Sheriff Miller offered at the suppression hearing indicated that Grayson had given a statement to Escambia County law enforcement officials about the Florida

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robberies at approximately 2050 hours (or about 8:50 P.M.). The interview with Sheriff Miller ended at approximately 2250 hours (about 10:50 P.M.), but no further information about the length of the interview is contained in the record. Miller testified that he only spoke to Grayson for a few minutes, and Grayson's attorney not only did not challenge that assertion, he actually supplied the number of minutes by asking "About three or four minutes?" to which the Sheriff responded "Something like that."

Q. [W]ould you read the line stated by Mr. Blayde Grayson, sir? It begins "no, sir". [FN3]

FN3. The quoted material is being read from a transcript of Miller's interview of Grayson in Escambia County, which was admitted as evidence in the suppression hearing, but was not offered into evidence at trial and is not in the record currently before this Court.

A. "No, sir, I'd rather not until I talk to my lawyer."
Q. All right. Now, that is about--what--about a quarter of the way into the interview?
A. Yes, sir.
Q. And he tells you at that point he wants to talk to his lawyer?
A. Yes, sir.
Q. All right. Now did you continue to question him after that, Sheriff?
A. Yes, sir.
*246 Q. All right .... answered, "no, sir, not really" and what was your response to that, Sheriff?
A. Okay. The Sheriff from Escambia County, you were wanting to talk to us. [sic] We're over here to talk with you.
Q. And Mr. Grayson's response is, "I was going to deal with you all when I got down there and got my lawyer". Is that correct?
A. That's correct.
Q. And what is your response to that, Sheriff?
A. Sheriff--this is a situation were you going to--
Q. Just on the green part is where I've highlighted where you are speaking, Sheriff.
A. "We need to establish where you were at--you're not willing to risk that. We need"--
Q. At that point Mr. Grayson responds, does he not, "I'm not willing to discuss nothing until I've talked to my lawyer. I didn't mean to bring you fellows all the way down here for nothing--now you know all the way down here-- but I need to talk to my lawyer about this--this is a situation". What is your response to that, Sheriff?
A. "This is a situation where you are going to confirm with him before you talk to us about the matter? That is correct".
Q. Mr. Grayson's response is "yes, sir"?
A. Sheriff--"you have not been in George County, is that correct"?
Q. And Mr. Grayson's response is "no, sir".
A. "Have you got witnesses to that, is that correct?"
Q. And Mr. Grayson's response is "yes, sir".

¶ 6. At that point, the State interrupted the line of questioning, and after some discussion, Grayson simply offered the transcript into evidence. In later testimony, Sheriff Miller basically conceded that Grayson asked for a lawyer four times in the space of about four minutes before the interview ended.

¶ 7. The Florida interview ended on the night of May 17, 1996, and then Sheriff Miller transported Grayson back to George County that same night. On Monday, May 20, Miller sought and received an order signed by Judge Ronnie Wilkerson to obtain blood and tissue samples from Grayson. [FN4] On Tuesday, May 21, Grayson (according to the testimony of Officer James Tanner) requested to speak with Sheriff Miller. Grayson gave a statement to Miller in which he admitted being at the scene of the crime but claimed that an individual named Jason Kilpatrick actually robbed and killed Smith. Later that afternoon, Grayson accompanied Sheriff Miller and Officer Tanner back to Florida to retrieve a checkbook taken from Smith's home that had been left in the trailer Grayson shared with Kilpatrick, which Grayson claimed implicated Kilpatrick.

FN4. Sheriff Miller later testified that he did not know if hair and blood samples were actually taken, and no such samples were offered as evidence at trial.

¶ 8. On Thursday, May 23, Grayson repeated his accusations against Kilpatrick in a written statement given during an interview with Sheriff Miller and Inspector Dorr. According to the testimony of Miller and Dorr, this interview was initiated by Grayson. At the conclusion of this interview, Grayson agreed to take a polygraph test. That test took place on Friday, May 24, in Jackson. After the polygraph examiner *247 indicated that Grayson failed the test and accused him of lying, Grayson admitted to killing Smith while robbing her home. Grayson later repeated that confession to Dorr and on videotape. The confession was admitted at trial, and Grayson was convicted on August 7, 1996, and sentenced to death by lethal

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injection.

ANALYSIS

I. SHOULD THE TRIAL COURT HAVE SUPPRESSED GRAYSON'S INCRIMINATING STATEMENTS TO THE POLICE?

[1][2] ¶ 9. Grayson's first assignment of error is that his confession should have been suppressed at trial, because he was denied his right to counsel guaranteed by the Fifth and Sixth Amendments of the U.S. Constitution and Article 3, Section 26 of the Mississippi Constitution or in the alternative, because the confession was involuntary.

¶ 10. The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The Supreme Court has held that a criminal prosecution, for Sixth Amendment purposes, begins with the initiation of "adversary judicial proceedings." *Kirby v. Ill.*, 406 U.S. 682, 688, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). The Fifth Amendment does not expressly grant a right to counsel, but it does guarantee a right against self- incrimination, and the Supreme Court has held this right to be violated where a suspect is not apprised of his right to an attorney upon a custodial arrest. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[3][4] ¶ 11. When a suspect invokes his right to counsel, all interrogation must cease until the lawyer is present, unless the suspect himself reinitiates communication with the police. *Edwards v. Arizona*, 451 U.S. 477, 484, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The Supreme Court in *Edwards* stated that:

> when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. [An accused], having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards, 451 U.S. at 484, 101 S.Ct. 1880. Such an invocation must be unambiguous; however, an ambiguous mention of possibly speaking with one's attorney is insufficient to trigger the right to counsel. *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994)(holding that statement of "Maybe I should talk to a lawyer" was insufficient to trigger right to counsel).

[5] ¶ 12. In addition to these rights guaranteed by the U.S. Constitution, the Mississippi Constitution also states that "[i]n all criminal prosecutions the accused ... shall not be compelled to give evidence against himself." Miss. Const. art. 3, § 26. We have construed this provision to be congruent with the right to counsel guaranteed by the Sixth Amendment of the U.S. Constitution, except for the fact that it attaches earlier: A person's § 26 rights attach when the police move from an investigatory phase to an accusatory phase, rather than at the actual start of adversary proceedings. *Williamson v. State*, 512 So.2d 868, 876 (Miss.1987). Thus, a suspect ***248** has a right to an attorney at the time of his arrest, regardless of whether he has been arraigned or has otherwise triggered his Sixth Amendment rights. *Williamson*, 512 So.2d at 876. As with the federal rules, when a suspect has invoked his right to counsel, interrogation must cease unless the suspect himself voluntarily reinitiates communication. *Mettetal v. State*, 602 So.2d 864, 868 (Miss.1992).

[6][7][8][9] ¶ 13. Where a suspect voluntarily initiates contact with police, he effectively waives both his Fifth and Sixth Amendment rights. *Genry v. State*, 735 So.2d 186, 196 (Miss.1999). When a suspect voluntarily signs a waiver form, he waives his right to have an attorney present during questioning. *Saucier v. State*, 562 So.2d 1238, 1244 (Miss.1990)(upholding validity of voluntarily signed waiver-of-rights form). While a signed waiver form satisfies the requirement that a waiver of rights be knowing and intelligent, any statements given can still be attacked on the grounds that they were involuntary. *Abram v. State*, 606 So.2d 1015, 1034 (Miss.1992)(holding that coerced confession renders otherwise valid waiver of rights forms to be ineffective). A trial court's finding that a confession is voluntary and admissible is a finding of fact which will not be reversed unless it is manifestly in error or against the overwhelming weight of the evidence. *Foster v. State*, 639 So.2d 1263, 1281 (Miss.1994). Grayson argues that his rights under the Fifth and Sixth Amendments and under § 26 were violated in order to secure his confession. In particular, he argues that his Sixth Amendment and § 26 rights had attached, even though he had not been arrested for or charged with the murder of Minnie Smith at the time the statements were made, apparently on the theory that he was entitled to be arrested at some point prior to his statements because the police moved

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from an investigatory posture to an accusatory posture during the course of his confinement.

¶ 14. As a threshold matter, Grayson's claim fails because he clearly waived any right to an attorney he might theoretically have had at the time he confessed. The trial court judge made an express finding in the record of the following facts: that the police ceased their interrogation of Grayson when he invoked his right to counsel, that Grayson himself reinitiated communication with the authorities, and that Grayson signed a waiver of his rights prior to giving his statement. Since there is no evidence that these findings were clearly erroneous, Grayson is not entitled to have his statement suppressed unless he can show that it was the product of coercion.

¶ 15. Grayson cites a number of factors surrounding his confinement which he says were sufficient to overcome his free will and render his confession involuntary, including: (1) the fact that he had to invoke his right to counsel four times before the police would terminate their first interrogation; (2) his being subjected to "jail watch," which he says consists of law enforcement officials "checking on" him every fifteen minutes, even during the night, resulting in sleep deprivation; (3) confinement for seven days without receiving an initial appearance or having counsel appointed; (4) being persuaded to take a polygraph test; and (5) being told that he failed the polygraph test and that it would "be better on [him] if he admitted to the charge."

¶ 16. The trial record does not support Grayson's interpretation of the facts or their legal significance. First, the Florida interrogation by Sheriff Miller, by Grayson's own estimate, lasted less than four minutes and elicited no information that was offered at trial. While George County ***249** law enforcement officials did testify that Grayson was put on "jail watch," Grayson has offered no evidence that merely being under observation (even at fifteen minute intervals) had any coercive effect, nor any evidence that he actually suffered sleep deprivation as a result of being under jail watch, in spite of an opportunity to cross-examine the officer responsible for performing the jail watch. Officer James Tanner gave the following illuminating testimony on this issue:

> Q. One last question, Deputy Tanner. What is the procedure--I think you referred to it as the jail watch--how often do you check in on prisoners--a couple of times an hour?
>
> A. Okay. On night shift, once an hour; on the day shift, if we have someone in the jail that has some kind of a problem, like a mental problem, mental patient or someone we want to keep an on to make sure they don't do harm to theirselves there is jail watch [sic]. It could be every 15 minutes, it could be every 30 minutes, every hour.
>
> Q. But it's at least once an hour, maybe four times an hour?
>
> A. Yes, sir.
>
> Q. All right. During the time you come in and check on them, do you just look in the door to make sure they're there or do you walk over and talk to them to make sure that they're coherent and conscious?
>
> A. We look in on them. If they are moving around, we know they're all right. We leave them alone. If they're asleep we might wake them up, especially in the daytime we make sure they're there.

¶ 17. This testimony--virtually the only testimony offered to describe jail watch--does not, in our opinion, demonstrate a coercive tactic likely to have overcome Grayson's freewill resulting in an involuntary confession.

¶ 18. Grayson's confinement was also proper, because he had violated conditions of his probation. He was under sentence to a restitution center program when he walked away from a work detail several months earlier. The sentencing order in his prior conviction says: "IT IS RECOMMENDED that if the defendant should fail to successfully complete the Restitution Center Program, the Commissioner of the Mississippi Department of Correction may without further order of this Court place the Defendant in the general population to complete said sentence." Consequently, Grayson was automatically subject to MDOC confinement without the necessity of an initial appearance or the appointment of counsel, and Grayson conceded at trial that return to the Restitution Center or placement in the George County Jail would have been equally proper. *See Babbitt v. State,* 755 So.2d 406, 409-10 (Miss.2000)(affirming MDOC assertion of jurisdiction over probation violators without intervention of court).

¶ 19. Grayson has not offered any evidence that police used coercive tactics to induce him to take the polygraph test, and Grayson's assertion that he was told it would be better for him to admit the charges is not supported by any testimony in the record. The polygraph examiner testified that he told Grayson "Blayde, you are not being truthful with me. I need you to talk about it." Inspector Dorr testified that he only tried to get Grayson to describe the crime fully,

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1311 (Miss.1982); *Hughes v. State,* 401 So.2d 1100 (Miss.1981)). In *Westbrook,* this Court rejected the idea that crime scene photographs, even gruesome ones, were irrelevant and inadmissible when the identity of the victim and the fact that the crime had occurred were undisputed. *Westbrook,* 658 So.2d at 850.

¶ 25. The pictures here were offered to corroborate the testimony of other prosecution witnesses, as well as to show the cause of death and the state of the crime scene at the time the investigation took place. Under the circumstances, the trial court did not abuse its discretion in admitting them into evidence.

IV. THE TRIAL COURT ERRED IN FAILING TO GRANT THE APPELLANT'S MOTION TO DECLARE MISSISSIPPI CODE SECTION 97-3-19(e) UNCONSTITUTIONAL OR IN THE ALTERNATIVE TO PRECLUDE THE PROSECUTION FROM RELYING ON MISSISSIPPI CODE ANNOTATED SECTION 99-19-101-5(d) AS AN AGGRAVATING CIRCUMSTANCE OF THE APPELLANT'S POSSIBLE CAPITAL SENTENCE TRIAL.

[18] ¶ 26. Grayson next argues that Mississippi's death penalty statute is itself unconstitutional under the standard articulated by the U.S. Supreme Court in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). There, the Supreme Court held that the death penalty may only be constitutionally imposed where the sentencing body's discretion is directed and limited in such as way as to avoid arbitrary and capricious executions. *Furman,* 408 U.S. at 257, 92 S.Ct. 2726 (Douglas, J., concurring). In other words, a death sentence must not be excessive in relation to the crime for which it is imposed, and death sentences must be imposed with reasonable consistency. *Gregg v. Georgia,* 428 U.S. 153, 187-88, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Grayson argues that applying the death penalty to all defendants who are guilty of felony murder violates this standard because doing so ignores the mental state of the defendant and because there is no rational or historical basis for treating a felony murderer as ***252** more culpable than a "depraved heart" murderer.

¶ 27. We have previously rejected this argument with reasoning best articulated as follows:

> All states have endorsed the common-law concept of felony murder in some form. In it the felon is considered "at risk" while committing the felony so that if a homicide results, it is considered murder, or, as in our state, capital murder if associated with the felonies, designated by the legislature. The legislature's intent was to protect the citizenry from the evil of the lesser felony by imposing a greater penalty upon a homicide occurring during its commission. Some authorities view the felony murder statutes as imputing or irrebuttably presuming a specific intent to kill from the association of the homicide with the underlying felony. These same authorities acknowledge "(*l*) ong standing judicial approval of the presumption provides strong indication that the presumption comports with due process."
>
> The appellant argues, however, that only 0.5% of robberies result in homicide. Therefore, it cannot be said the robber in every case intended to kill. This may be true, but we think it overlooks the great danger the aggressor willfully imposes upon his victim. The constituent crime with its hazardous potential is that which the legislature intended to deter by permitting capital punishment if death results from the felonious undertaking.
>
> Presently, we can say without doubt the appellant schemed and participated in the unlawful undertaking which resulted in death. The subjunctive nature of the intention to kill makes it no less deliberate and no less deserving of capital punishment than if it had been expressed, in our opinion. The felon who causes death in furthering his crime manifests a callous disregard for human life, because he subordinates the life of the innocent to his desire for gain, thereby inviting the outrage of a society understandably bent upon protecting itself from physical violence.

Culberson v. State, 379 So.2d 499, 507 (Miss.1979) (internal citations omitted).

[19] ¶ 28. Grayson also argues that Miss.Code Ann. § 99-19-101(5)(d) is unconstitutional for basically the same reasons. We addressed this issue as well in *Holland v. State,* 705 So.2d 307, 320 (Miss.1997) (holding § 99-19- 101 to be constitutionally sound). To deliver a death penalty verdict, a jury must find that the defendant actually killed the victim, attempted to kill the victim, intended that a killing take place, or contemplated that lethal force would be employed. Miss.Code Ann. § 99-19-101(7). This naturally has the effect of substantially limiting the class of individuals who can receive the death penalty. *Holland,* 705 So.2d at 320. The class of potential death penalty cases is further limited by statute in other ways, such as the situation in the instant case where a defendant has killed during the commission of a robbery. *Id.* (citing § 97-3-19(2)(a), (d), (e), and (g)). In light of these factors, we reaffirm *Holland* and reject Grayson's

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constitutional claim on this issue.

V. THE TRIAL COURT ERRED IN NOT GRANTING THE APPELLANT'S MOTION FOR MISTRIAL BASED ON COMMENTS MADE BY POTENTIAL JURORS DURING VOIR DIRE.

[20][21] ¶ 29. Next, Grayson argues that he was entitled to a mistrial because of comments made during voir dire by Littlefield Eubanks, one of the veniremen. The standard of review applied to decisions of whether to grant a mistrial based *253 upon the voir dire statements of potential jurors is abuse of discretion. *Evans*, 725 So.2d at 649. In *Evans*, a potential juror made improper statements during voir dire. *Id.* The trial court in that case denied the defendant's motion for a mistrial, but did not admonish the jury to disregard the comment. *Id.* We affirmed the trial court's ruling on the grounds that the prosecutor asked whether any jurors would be influenced by the statement during voir dire, and all agreed that it would not affect their decision. *Id.*

¶ 30. In case sub judice, the record reflects the following exchange during voir dire:

> BY A JUROR: Your Honor, Littlefield Eubanks. I feel exactly the same way, under the circumstances of what I've heard in this case. If it's all true, then it would be automatic for me. [FN5]
>
> FN5. This remark was made in response to another juror's statement that she would automatically vote to impose the death penalty if she found the defendant guilty.
>
> BY THE COURT: So you're telling me, Mr. Eubanks, that if you believe from the evidence as presented that this man is guilty of capital murder, you would not be able to consider any evidence of mitigation or anything like that? You would just be automatically inclined to give the death penalty?
> BY A JUROR: Your Honor, that's exactly what I'm saying, because ***apparently he's mentally off*** and--
> BY THE COURT: Wait. Wait.
> BY MR. HARKEY: Excuse me--
> BY THE COURT: Don't say anything about your personal beliefs along those lines, sir. All I want to know is that are you inclined that, if he's found guilty, to automatically impose the death penalty?
> BY A JUROR: Yes, ma'am.

(emphasis added).

¶ 31. Grayson made no objection to Eubanks's statement at the time it was made; at the conclusion of voir dire, however, he made a motion for a mistrial which was denied. The other jurors were neither questioned about the statement nor admonished to disregard it. Grayson appears to argue that this brief statement is inflammatory and served to "pervade" the jury.

¶ 32. The record reflects, however, that the trial judge quickly interrupted Eubanks's statement. While the court did not admonish the jury to disregard the statement and the prosecutor did not ask the prospective jury members at the time whether they would be able to disregard the statement, it did later ask whether they could be fair, and the prospective members indicated that they could be. That fact, combined with the brief nature of the comment, suggests that it was not so prejudicial as to warrant a mistrial, and the trial court did not abuse its discretion in denying that motion.

VI. THE TRIAL COURT ERRED IN STRIKING JURORS BRIDGET PHILLIPS AND BERNARD GOFF WITHOUT PROPER SHOWING THAT THE POTENTIAL JURORS COULD NOT FOLLOW THE LAW IN REGARD TO THE DEATH PENALTY.

[22] ¶ 33. Grayson next argues that two prospective jurors, Bridget Phillips and Bernard Goff, were improperly struck for cause due to their statements made during voir dire indicating that they had strong reservations about imposing the death penalty due to their religious convictions. *254 Specifically, Grayson argues that the rights of the two jurors themselves guaranteed under the First Amendment's Free Exercise Clause were violated by their being struck. Grayson analogizes striking a juror for religious reasons to striking one for racial reasons. This analogy is inapposite, however, because the rights of individual jurors to sit on a jury panel are outweighed by the State's legitimate interest in excluding jurors whose opposition to capital punishment will not allow them to view the proceedings impartially, and who therefore might frustrate a State's lawful administration of the death penalty.

¶ 34. The U.S. Supreme Court articulated a clear standard for when a juror who voices objections to the death penalty may be challenged for cause. *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)("[A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with

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his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court").

¶ 35. We have also considered an argument similar to Grayson's in *Thorson v. State,* 721 So.2d 590 (Miss.1998). There, the State exercised peremptory challenges against two jurors solely because they belonged to a religious sect known as the Holiness Faith. *Thorson,* 721 So.2d at 593. We reversed, holding that exercise of such challenges was prohibited by Article 3, Section 19 of the Mississippi Constitution . *Id.* at 594. However, we also noted that the potential jurors at issue could have been struck if voir dire had revealed that they were truly unable to "sit in judgment of [their] fellow man regardless of the position of the Holiness Faith." *Id.* at 595. In such a case, there would be valid reason for striking such a juror for cause, and in fact, the striking of one of the two *Thorson* jurors was held to be harmless error because there were additional, permissible reasons for striking her. *Id.* Since the record in this case reflects that both Phillips and Goff stated that they would be unable to consider giving the death penalty if they found Grayson guilty, the rule established in *Thorson* is inapplicable to Grayson's case, and this issue is without merit.

VII. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR FUNDS FOR PRIVATE INVESTIGATOR AND JURY CONSULTANT DESPITE REPEATED REQUESTS BY THE APPELLANT.

[23][24][25] ¶ 36. The trial court's decision on a motion for funding for consultants or investigators for an indigent defendant is reviewed for abuse of discretion. *Hansen v. State,* 592 So.2d 114, 125 (Miss.1991). Grayson submitted two motions for funds for a private investigator, one dated March 7, 1997, and the other dated July 7, 1997. He also made an oral motion for funds to procure a jury consultant on June 27, 1997. The trial court delayed ruling on that motion pending the filing of a formal motion, but the record contains no such motion and the issue is not raised again during the trial. Grayson made a final ex parte motion on July 31, 1997, requesting funds for a second investigator to pursue exculpatory evidence from an unidentified out-of-state witness.

¶ 37. On the issue of the jury consultant, we have said that "[t]he movant bears the responsibility of obtaining a ruling from the court on a motion filed by him and his failure to secure such a ruling *255 constitutes waiver." *Johnson v. State,* 461 So.2d 1288, 1290 (Miss.1984) (holding that denial of funds to hire forensic expert for defense was not abuse of discretion where defense counsel was supposed to supply court with list of potential experts but failed to do so). Furthermore, the Fifth Circuit has recently held that the right of an indigent to a court-appointed psychiatric expert does not extend to a right to a jury-selection expert. *Moore v. Johnson,* 225 F.3d 495, 503 (5th Cir.2000). There, the court noted that "a defendant cannot expect the state to provide him a most-sophisticated defense; rather, he is entitled to 'access to the raw materials integral to the building of an effective defense.' " *Moore,* 225 F.3d at 503 (citing *Ake v. Oklahoma,* 470 U.S. 68, 77, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)).

¶ 38. On the issue of funding for a private investigator, the record is clear that Grayson did in fact receive funding for an investigator named Clayton M. Hall up to a maximum of $750, and the trial court in fact ordered that the county pay that investigator the sum of $500 in satisfaction of Hall's bill. The court never ruled on funding for the second investigator, one James Bowman, which is tantamount to a denial of Grayson's motion.

[26] ¶ 39. We have recognized that "there may be instances, when in fairness, the state should be required to provide and pay for non-legal personnel needed by the defense" upon a showing of substantial need. *Hansen v. State,* 592 So.2d at 125. The accused is required to offer concrete reasons for requiring such assistance, not "undeveloped assertions that the requested assistance would be beneficial...." *Id.* at 125 (citing *Caldwell v. Mississippi,* 472 U.S. 320, 323 n. 1, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)).

¶ 40. The trial court had already approved $750 in funds for one investigator, not all of which was spent. The second motion stated that funds were needed to contact a "possible exculpatory witness" without any further information, as well as to arrange to subpoena this witness and transport him or her to Grayson's trial. In light of this sparse information, the trial court did not abuse its discretion in denying the motion for additional funds.

SECTION 99-19-105(3) REVIEW

[27] ¶ 41. As a final matter, we must also review the death sentence in accordance with Miss.Code Ann. § 99-19-105(3), which states:

(3) With regard to the sentence, the court shall determine:

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(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;
(b) Whether the evidence supports the jury's or the judge's finding of a statutory aggravating circumstance as enumerated in Section 99-19-101;
(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; and
(d) Should one or more of the aggravating circumstances be found invalid on appeal, the Mississippi Supreme Court shall determine whether the remaining aggravating circumstances are outweighed by the mitigating circumstances or whether the inclusion of any invalid circumstance was harmless error or both.

¶ 42. Under this analysis, there is no evidence supporting a finding that the death sentence was imposed under the influence of passion, prejudice or any other arbitrary factor. Indeed, the analysis of *256 the change of venue issue above compels a conclusion that there was no overwhelming passion or prejudice influencing this case. The evidence that Grayson was under sentence of imprisonment at the time of the murder is undisputed and satisfies § 99- 19-105(3)(b). Finally, we have previously held that the imposition of the death penalty on a defendant convicted of murder during a robbery in which he stabbed the victim 31 times was not disproportionate. *Wilcher v. State*, 697 So.2d 1087 (Miss.1997). Giving the equally heinous nature of the crime committed here, imposition of the death penalty on Blayde Grayson is neither excessive nor disproportionate in comparison to his crime. See Appendix.

CONCLUSION

¶ 43. For these reasons, Grayson's conviction and sentence are affirmed.

¶ 44. CONVICTION OF CAPITAL MURDER AND SENTENCE OF DEATH BY LETHAL INJECTION ARE AFFIRMED.

PITTMAN, C.J., SMITH, P.J., AND WALLER, DIAZ AND EASLEY, JJ., CONCUR. McRAE, P.J., CONCURS IN RESULT ONLY. CARLSON AND GRAVES, JJ., NOT PARTICIPATING.

APPENDIX
DEATH CASES AFFIRMED BY THIS COURT

Stevens v. State, 806 So.2d 1031 (Miss.2001).

Mitchell v. State, 792 So.2d 192 (Miss.2001).

Puckett v. State, 788 So.2d 752 (Miss.2001). [FN*] following remand.

FN* Case was originally affirmed in this Court but on remand from U.S. Supreme Court, case was remanded by this Court for a new sentencing hearing.

Goodin v. State, 787 So.2d 639 (Miss.2001).

Jordan v. State, 786 So.2d 987 (Miss.2001).

Manning v. State, 765 So.2d 516 (Miss.2000). *following remand.

Eskridge v. State, 765 So.2d 508 (Miss.2000).

McGilberry v. State, 741 So.2d 894 (Miss.1999).

Puckett v. State, 737 So.2d 322 (Miss.1999). *remanded for *Batson* hearing.

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*257 *Holland v. State*, 705 So.2d 307 (Miss.1997).

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Brown v. State, 690 So.2d 276 (Miss.1996).

Simon v. State, 688 So.2d 791 (Miss.1997).

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Russell v. State, 670 So.2d 816 (Miss.1995).

Ballenger v. State, 667 So.2d 1242 (Miss.1995).

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Carr v. State, 655 So.2d 824 (Miss.1995).

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Chase v. State, 645 So.2d 829 (Miss.1994).

Foster v. State, 639 So.2d 1263 (Miss.1994).

Conner v. State, 632 So.2d 1239 (Miss.1993).

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**Shell v. State*, 554 So.2d 887 (Miss.1989), *Shell v. Mississippi*, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990) reversing, in part, and remanding, *Shell v. State*, 595 So.2d 1323 (Miss.1992) remanding for new sentencing hearing.

Davis v. State, 551 So.2d 165 (Miss.1989).

DEATH CASES AFFIRMED BY THIS COURT
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Supreme Court, U.S.
FILED
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NO. 01-10192

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

BLAYDE GRAYSON,
Petitioner

versus

STATE OF MISSISSIPPI,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

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37 pp

CAPITAL CASE

QUESTIONS PRESENTED

I. **PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS NOT VIOLATED, THEREFORE CERTIORARI SHOULD BE DENIED.**

II. **PETITIONER'S QUESTION WOULD REQUIRE THIS COURT TO ISSUE AN ADVISORY OPINION WHICH IS PROHIBITED UNDER ARTICLE III, OF THE CONSTITUTION OF THE UNITED STATES.**

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versus

STATE OF MISSISSIPPI,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

This matter is before the Court on the petition of Blayde Grayson for a Writ of Certiorari to the Supreme Court of Mississippi wherein the court below affirmed Grayson's conviction of capital murder and sentence of death.

OPINION BELOW

The opinion of the Mississippi Supreme Court affirming petitioner's conviction of capital murder and sentence of death is reported as *Grayson v. State*, 806 So.2d 241 (Miss. 2001). The opinion is reprinted as Appendix A to Grayson's petition for writ of certiorari.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to the authority of 28 U.S.C. §1257(a) challenging the constitutionality of his sentence.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has invokes the provisions of the United States Constitution, Amendment Five, Six, Eight and Fourteen. Petitioner has set forth the pertinent text of these provisions in his petition.

STATEMENT OF THE CASE

A. Substantive Facts:

The facts of this case reflected by the record show that on May 3, 1996, seventy-eight year old Minnie Smith a resident of John Smith Road in the Central Community of George County, Mississippi, went to the bank and deposited approximately $500.00 of her Social Security check in her bank account. She kept $200.00 in cash for herself. Her daughter, Elaine Pierce, who live approximately 100 yards from Mrs. Smith's home saw her mother around 7:00 p.m. on the evening of May 4, 1996. She last talked with her by telephone around 9:30 p.m. that night. The next morning her son-in-law, Buddy Pierce, arose as usual around 5:00 a.m. As was his custom, around 7:00 a.m., Buddy drove to Bendale to purchase some biscuits for breakfast for the three of them. He noticed that Mrs. Smith was not up, which was somewhat unusual. He also noticed that a screen was missing off of one of the windows to Mrs. Smith's house. Pierce then went on to Bendale, when he returned he noticed that Mrs. Smith was still not up and around. He returned to his house and got his

wife to go over and eat breakfast. He finds the front door locked, he knocks, there is no answer. He began walking around the house and again notices the window screen is missing. Becoming alarmed he walks to the rear of the house and finds the back door unlocked. He went into the house and found Mrs. Smith in her bed in her night clothes with blood everywhere. He goes back and prevents his wife from coming into the house. The authorities are called and when they arrive they discern that Mrs. Smith is in fact dead with numerous stab wounds to her face, chest and neck.

On May 17, 1996, Grayson was arrested in Escambia County, Florida, several days later he confessed that he went to Mrs. Smith's house to steal whatever he could. He broke into the house and while he was there, Mrs. Smith woke up and he killed her.

B. Procedural History:

The petition at bar comes to this Court from a case originating in the Circuit Court of George, Mississippi, wherein Blayde Grayson was convicted of the crime of capital murder during the course of a burglary and sentenced to death. Grayson was indicted during the July 1996 Term of the Circuit Court of George County, Mississippi for violation of MISS. CODE ANN. § 97-3-19 (2) (e). A jury was empaneled on August 4, 1997, and Grayson was tried on the indictment and found guilty on August 7, 1997. After the jury found Grayson guilty, a sentencing hearing was held on the capital murder conviction where the jury heard evidence in aggravation and mitigation of sentence. After due deliberation, on August 8, 1997, the jury returned a sentence of death in proper form. The jury verdict on sentence reads as

follows:

> We, the jury, unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of the capital murder:
>
> 1. That the Defendant actually killed Minnie Smith
>
> 2. That the Defendant attempted to kill Minnie Smith
>
> 3. That the Defendant intended the killing of Minnie Smith take place
>
> 4. That the Defendant contemplated that lethal force would be used.
>
> We, the jury, unanimously find that the aggravating circumstances of:
>
> 1. the capital offense was committed for pecuniary gain during the course of a burglary.
>
> 2. the capital offense was especially heinous, atrocious, or cruel
>
> 3. the capital offense was committed by a person under sentence of imprisonment
>
> 4. The capital offense was committed for the purpose of avoiding or preventing a lawful arrest.
>
> are sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstance [sic] and we further find that the Defendant should suffer death.
>
> s/Jerry D. Hudson
> FOREMAN THE JURY

CP. at 167-68.

After being convicted and sentenced to death Grayson took a direct appeal to the Mississippi Supreme Court. In this appeal Grayson raised the following seven claims:

I. THE TRIAL COURT ERRED IN FAILING TO GRANT THE APPELLANT'S MOTION TO SUPPRESS STATEMENTS GIVEN TO LAW ENFORCEMENT OFFICERS.

II. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR CHANGE OF VENUE.

III. THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF PHOTOGRAPHS OF THE VICTIM AND OF THE CRIME SCENE INTO EVIDENCE.

IV. THE TRIAL COURT ERRED IN FAILING TO GRANT THE APPELLANT'S MOTION TO DECLARE MISSISSIPPI CODE SECTION 97-3-19(e) UNCONSTITUTIONAL OR IN THE ALTERNATIVE TO PRECLUDE THE PROSECUTION FROM RELYING ON MISSISSIPPI CODE ANNOTATED SECTION 99-19-101-5(d) AS AN AGGRAVATING CIRCUMSTANCE OF THE APPELLANT'S POSSIBLE CAPITAL SENTENCE TRIAL.

V. THE TRIAL COURT ERRED IN NOT GRANTING THE APPELLANT'S MOTION FOR MISTRIAL BASED ON COMMENTS MADE BY POTENTIAL JURORS DURING VOIR DIRE.

VI. THE TRIAL COURT ERRED IN STRIKING JURORS BRIDGET PHILLIPS AND BERNARD GOFF WITHOUT PROPER SHOWING THAT THE POTENTIAL JURORS COULD NOT FOLLOW THE LAW IN REGARD TO THE DEATH PENALTY.

VII. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR FUNDS FOR PRIVATE INVESTIGATOR AND JURY CONSULTANT DESPITE REPEATED REQUESTS BY THE APPELLANT.

See Grayson v. State, 806 So.2d 241, 244 (Miss. 2001).

On November 8, 2001, the court below affirmed the conviction and sentence of death in a written opinion. A timely petition for rehearing was filed and later denied on February 7, 2002. From this adverse decision in the court below Grayson now brings a petition for writ

of certiorari to this Court.

REASONS FOR DENYING THE WRIT

Petitioner did not properly raise the Sixth Amendment claim in the court below therefore this Court is without jurisdiction to consider the same. If the claim was only tangentially raised, the opinion of the court below suffices to hold that there was no Sixth Amendment violation as that right had not attached to the capital murder charge at the time he gave his statement regarding the crime.

Petitioner's second question would require this Court to issue an advisory opinion as the jury in this case found that petitioner actually killed the victim in this case.

ARGUMENT

I. PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS NOT VIOLATED, THEREFORE CERTIORARI SHOULD BE DENIED.

Petitioner contends that the court below failed to reach the question of whether his Sixth Amendment right to counsel had attached at the time he gave his incriminating statement and therefore warrants reversal.

While the court below noted that petitioner was contending that his confession was in violation of the Sixth Amendment and cited pertinent Sixth Amendment authority[1] when concluding that there was no error in admitting the confession the Court did not specifically state that there was no Sixth Amendment violation. The reason for this manner of

---

[1] *See* 806 So.2d at 247 ¶¶ 9-12.

approaching the question seems to be the focus of petitioner's brief before the court below. The essence of petitioner's argument to the court below was:

> The question is thus raised, how can a criminal defendant waive his rights if, once those rights are specifically invoked, law enforcement continues to question and harass the defendant until he makes an inculpatory statement? Secondly, how can a waiver be knowingly and intelligently made if the defendant is denied access not only to an attorney, but also to the court system, as well as being deprived of sleep and harassed for over a week and not explained his right to refuse a polygraph examination or informed of its inadmissibility in court and told coercive statements by an "expert" represent the State?
>
> Appellant's Direct Appeal Brief at 10.

Petitioner's argument before the court below concentrated on the voluntariness of the confession and on a question of whether petitioner reinitiated contact with law enforcement officers after requesting counsel. Additionally, petitioner seemed to make a claim that he should have been arrested on a charge of accessory after the fact or the capital murder charge at an earlier point in time.[2]

Petitioner's citation to the Sixth Amendment and supporting authority in the court below was for the sole proposition that he was not able to deal with law enforcement without counsel, not that his Sixth Amendment rights had vested. The argument in the court below was based on an alleged Fifth Amendment violation. *See* Appendix I (Petitioner's Brief for Appellant, Issue I).

---

[2]Presumably the reason for this claim was so that his Sixth Amendment rights would have attached at an earlier point in the proceedings.

Looking to the trial record we find the focus had been on the Sixth Amendment in the suppression hearing in the trial court. Looking to the trial court's ruling we find the trial judge's finding of fact and conclusion of law. The trial court held:

> BY THE COURT: . . . Friday afternoon, all day Friday, actually, the Court heard a motion to suppress the statement or the confession given by Mr. Grayson. I, by telephone on Saturday – by telephone on Saturday, I call the attorneys to give them my ruling, with the understanding that I would put my reasoning for the ruling into the record this morning. That's what I intend to do now.
>
> We had an all day motion with many witnesses called to testify on Friday. The motion, as filed, was basically a motion to suppress Mr. Grayson's confession based upon the 6th Amendment right to counsel. The Court has reviewed everything I was asked to review on Friday, the videotape -- I reviewed all the exhibits that were admitted. And, of course, I read the case law submitted to the Court, as well as other case law that may apply in this matter. Mr. Ishee, do you want to say something before I finish my ruling?
>
> BY MR. ISHEE: No, ma'am.
>
> BY THE COURT: Okay. First of all, on the question of the 6th Amendment, I have carefully reviewed the evidence and the events as they occurred between, I believe May 17th and May 24th, 1996. It is my understanding that in the State of Mississippi, your 6th Amendment right to counsel attaches once the accused has been arrested and at the point in time when an initial appearance ought to have been held on that charge. It is my opinion that that means, in the context of this case, on the charge of capital murder. The evidence is clear this man was not arrested for capital murder until sometime the afternoon of May 24th, 1996. He was, however, in custody, first of all in Florida. And then a warrant was served on him by George County officials, a warrant issued by this Court, for a violation of the conditions of the Restitution Center in Pascagoula. I have no reason to hold anything other than that was a completely valid warrant. No question has ever been raised about that warrant. And, in fact, I believe sometime the end of last year, Mr. Grayson did come in on a revocation hearing and admit the allegations of that and his probation was revoked. So, there was a perfectly

valid warrant issued and served on Mr. Grayson. And I would like also the record to be clear that that warrant was issued many months prior to this murder. I believe it was in January of 1996 when I issued that warrant.

All right. Now, with that, it is clear from the reading of the cases, or most of the cases on the 6th Amendment, that the 6th Amendment right to counsel is offense specific. It goes only to the offense that you're charged with at the time. We got into a discussion on Friday, I believe during argument, as to whether he was entitled to some sort of initial appearance on the revocation question, since it was a revocation warrant. I attempted to do some research over the weekend. All I could find is that, in Mississippi, there is not any absolute right to have an attorney appointed or present during a revocation, a full revocation hearing, much less a preliminary hearing on that charge – on a revocation. But, even in that light, ignore that, let's assume that maybe he should have had an initial appearance. And I want to say of the record I cannot find any authority for an initial appearance on a revocation warrant. But even if he should have been given an initial appearance on that charge and he had invoked his 6th Amendment right on that charge, that has nothing to do with the capital murder charge, because it would have been offense specific. It would have applied only to his revocation. That's my understanding of the law.

This defendant still had the right to waive his 5th Amendment rights, even if his 6th Amendment rights had attached. But it is the finding of this Court that they had not attached on the capital murder charge.

The defendant made an argument to the Court that – I guess what he was saying, Mr. Harkey presented me evidence, a case on the point, so y'all correct me if I'm wrong, if I misunderstood the argument Mr. Ishee was making to the Court – that he should have been arrested on the charge of capital murder sooner than when he was arrested, or arrested for an accessory charge for capital murder after the second statement was given. I can find absolutely no law and have found law to the contrary, that you have no right to be arrested at any particular point in time. And there is no magical formula for when does probable cause occur. But, the facts of this case clearly showed this Court that, up until Mr. Grayson's last statement, George County authorities had very little, if any, probable cause to have charged him with capital murder. And it's clear to me that if they in fact had arrested him earlier on that charge, that we would in all likelihood be here on a motion to suppress a statement because of an illegal arrest. So, I don't think he had any right to

be arrested sooner on the charge of capital murder.

So, as I've already said, I don't think that the facts, as I heard them, showed any violation of the defendant's 6th Amendment right, because I don't think that right had attached at the time these statements were given.

Now, the motion did not specifically go to the question of the 5th Amendment rights that Mr. Grayson had at that time, but everyone argued it when we had the closing arguments. And, from the facts as I heard them to be, it appears to this Court this is a 5th Amendment issue. I want to say from the outset that my understanding of the facts were that on May 17th, 1996, Mr. Grayson was arrested in Florida for unrelated charges to any of this. I believe they were armed robbery charges. He spoke with the police down there. He voluntarily waived his rights. He gave a statement of those charges the have nothing to do with our charges. During that time, he found out that George County officials were there. He asked to speak to George County officials. The sheriff and some deputies went to talk to him. They read him his Miranda rights. He waived those rights and he started to talk to them. During that statement, he invoked his 5th Amendment right to counsel. It's clear from the statement. Several times he said he didn't want to talk to them without a lawyer. He wanted to "talk to his lawyer first," or words to that effect. So, clearly, Mr. Grayson invoked his 5th Amendment right during the May 17th, 1996 statement.

My understanding of the law is that, at that point, all questioning had to stop. Law enforcement could not question him any further until an attorney was present. Nothing else occurred, other that the warrant was served on Mr. Grayson on the probation violation. He was taken back to George County the early morning hours of the 18th. Sometime during the day, I believe it was around noon, form the jail log, it appears that Mr. Grayson requested to talk to the Sheriff of George County. Nothing was done. From what I heard, the sheriff did not talk to him on that date. Then again, on May 21st Officer Tanner, along with a report that was – Officer Tanner's testimony, along with his report that was admitted into evidence, showed that Mr. Grayson again requested to talk to the Sheriff of George County. And, at that time, he was brought in to the sheriff and he was give his Miranda rights and he gave a voluntary statement to the police implicating someone else in this crime.

I believe it was also at that time that he volunteered to go to Florida and find some evidence, help them gather evidence over there in Florida that may

have come out of this burglary of Ms. Smith's house. All of that happened on the 21st.

Then, on the 23rd, he again was given Miranda rights. He waived those rights. He gave a full written or recorded statement to Investigator Dorr – Is that his name? Dorr? – which was basically a full statement of what he had told the sheriff two days earlier. It was during that statement the he was asked if he would have a polygraph taken. Mr. Grayson agreed that he would go for a polygraph the following day. On the following day the was transported to Jackson. He was placed on the polygraph. He was given the test. And at some point in time – I believe it was at the end of the test – the officer who gave the test came in and made the statement to Mr. Grayson the he was not being honest or there was some deception or whatever words polygraph operators use. And, at that point, Mr. Grayson asked to speak to Investigator Dorr. He was transported – he was moved down to another room where he talked to Officer Dorr, after again being advised of his rights and waiving those rights. And he gave a video statement concerning his part in this – the death of Ms. Smith.

All of this, in my opinion, goes to the 5th Amendment question. He raised his 5th Amendment rights on the 17th. The State could no longer question him on this or any other charge after he did that. The only exception to that, that I could find in any case in the United States, is if the defendant reinitiates contact with the police. Mr. Grayson did that on two separate – two separate times. The second time is when the sheriff actually talked to him. He waived his rights after they were explained to him each and every time. And he waived those rights every time he spoke to the police after he initiated contact with them.

I also want to say for the record I have heard absolutely no evidence that this man was in any way threatened, in any way coerced, in any way promised anything to cooperate with he police at that point. There was some argument at the end of the motion the other day concerning Mr. Ishee's question of – out of the case of *Abram vs. State* where you addressed the issue of the coercive impact of incarceration. Well, I have read *Abram vs. State* and I don't see the first fact in that case that is similar to the facts in this case. In that case, trickery was used, subterfuge was used. Many different methods were used to get Abram to give a statement in that case. He was not allowed contact with anybody except those that the law enforcement wanted him to have contact with. Absolutely nothing like the case before the Court. This

defendant was given access to telephones. He was allowed visitors of his choice, not the sheriff's choice. He was familiar with the criminal justice system. He was not subjected to any kind of trickery, promises, hopes of reward or promises of leniency or threats or anything like that. This defendant, on his own, decided to cooperate with the police. He initiated further discussions. And each and every time after that initiation, he knowingly and voluntarily waived his rights and gave statements to the George County officials.

I would like also to note for the record that a question was raised also in argument on Friday that perhaps Mr. Grayson – I believe Mr. Ishee said something about special classes or his educational level or something to that effect. I would like to state for the record that this Court took Mr. Grayson's guilty pleas on the two charges that he's now a convicted felon on and he's serving time for. I took those guilty pleas. I know the lengths I go to -- and that was two years ago. It would have been a year before this interrogation -- the lengths that I go to, when I take a guilty plea, to be assured that the defendant understands what rights he has, what rights he's waiving. I go over his educational background. I ask him whether or not he can read and write, whether he understands what's going on. It's a very lengthy hearing that we have on a guilty plea. And all of that is under oath. Mr. Grayson assured me and convinced me during that guilty plea that he knew what was going on. He understood his rights and he voluntarily waived those rights and entered guilty pleas before this Court. I have heard nothing at all that would indicate to me that anything has changed since that time. Obviously, his educational background is not less than it was the year before when I took his guilty pleas. And I've not heard anything that would even tend to indicate in any way that he has any less knowledge of the criminal justice system, or did in May of 1996 than he had the year before when I took his guilty pleas. So, I can find absolutely no reason, from the evidence that I heard, to suppress the statement given on May 24th, 1996. He repeatedly was read his rights. He repeatedly waived those rights, voluntarily and intelligently. And he made the statements to the George County law enforcement officers. And, for those reasons, the Court will deny your motion to suppress the confession, Mr. Ishee.

Tr. 367-77.

After some discussion with counsel and the district attorney regarding a specific allegation of coercion, the trial court further stated:

BY THE COURT: I didn't specifically address everything that y'all argued on Friday, but that was one of the things that I did look at in the video. And my ruling is that the statements were voluntarily given. There were not promises or hopes or rewards or threats or anything like that made to Mr. Grayson to get him to give the statements. But I don't – I didn't go through each one of the allegations that you made. I found, from all the circumstances that I heard here on Friday, that each and every statement after his initial one on the 17th, after he initiated contact with the George County Sheriff's Department, each one of those statements given were freely and voluntarily made after he was advised of his rights and he waived those rights.

Tr. 379-80.

Clearly, from the finding of the trial court petitioner was incarcerated on a charge of probation violation for walking away from a restitution center. He was not incarcerated on a charge of capital murder until July 24, 1996, after he had given a confession stating that he had killed Mrs. Smith.

On direct appeal, in relation to the Sixth Amendment claim, the Mississippi Supreme Court held:

¶ 18. Grayson's confinement was also proper, because he had violated conditions of his probation. He was under sentence to a restitution center program when he walked away from a work detail several months earlier. The sentencing order in his prior conviction says: "IT IS RECOMMENDED that if the defendant should fail to successfully complete the Restitution Center Program, the Commissioner of the Mississippi Department of Correction may without further order of this Court place the Defendant in the general population to complete said sentence." Consequently, Grayson was automatically subject to MDOC confinement without the necessity of an initial appearance or the appointment of counsel, and Grayson conceded at trial that return to the Restitution Center or placement in the George County Jail would have been equally proper. *See Babbitt v. State*, 755 So.2d 406, 409-10 (Miss.2000)(affirming MDOC assertion of jurisdiction over probation violators without intervention of court).

806 So.2d at 249.

Clearly, the Mississippi Supreme Court was holding that the offense specific Sixth Amendment claim was without merit as petitioner was not arrested on the charge of capital murder until after he had confessed.

The Mississippi Supreme Court was addressing the claim raised in the direct appeal, the Fifth Amendment claim. The Sixth Amendment claim was not squarely raised in the court below. Since the Sixth Amendment claim was not squarely raised the decision of the court below addressed it in a tangential fashion.

The Sixth Amendment claim was not the focus of the claim on direct appeal therefore, the court below did not address fully address the claim. The mere failure to address the claim fully is not grounds for granting certiorari as the claim was not fully raised on direct appeal. To the extent that this claim was not raised at the proper time or in the proper manner in the court below, this Court has no jurisdiction to consider the claim. *See Michigan v. Long*, 463 U.S. 103 (1983); *Webb v. Webb*, 451 U.S. 493 (1981); *Street v. New York*, 394 U.S. 576 (1969); *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

Looking to the finding of the trial court and the court below it is clear that petitioner's Sixth Amendment right to counsel had not attached at the time he gave the statement, basically a denial of all culpability, to law enforcement officers as he had not been charged with capital murder.

Since petitioner has not shown a deprivation of a federal constitutional right certiorari

should be denied.

II. PETITIONER'S QUESTION WOULD REQUIRE THIS COURT TO ISSUE AN ADVISORY OPINION WHICH IS PROHIBITED UNDER ARTICLE III, OF THE CONSTITUTION OF THE UNITED STATES.

Petitioner next argument is not about what did happen in this case under the Mississippi capital sentencing scheme, but what he speculates could happen under the scheme. Respondent would submit a ruling on this claim would, at best, amount to rendering an advisory opinion. This Court has no authority to render an advisory opinion. *See Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion"); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

Petitioner contends that because the jury in this case was instructed during the sentencing phase of the trial that it could consider the intent factor of "contemplated that lethal force would be employed" and found that factor in assessing the death penalty his death sentence is flawed and must be vacated. He contends the Mississippi Supreme Court failed to properly apply the rules announced in *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987) in affirming his sentence of death on this basis. What petitioner does not mention is that the jury found the following intent factors before returning a sentence of death:

1. That the Defendant actually killed Minnie Smith

2. That the Defendant attempted to kill Minnie Smith

3. That the Defendant intended the killing of Minnie Smith take place

4. That the Defendant contempiated that lethal force would be used.

State Court Papers at 167-68.

Therefore, even if the fourth intent factor was in some manner flawed the jury found that Grayson actually killed Mrs. Smith. This was all the jury was required to find in order to return the sentence of death under Mississippi law. *See Jordan v. State*, 786 So.2d 987, 1026 ¶¶ 152-53 (Miss. 2001), *cert. denied*, ___ U.S. ___, 122 S.Ct. 823, 151 L.Ed.2d 705 (2002); *Watts v. State*, 733 So.2d 214, 242, ¶¶ 83-85 (Miss. 1999); *Carr v. State*, 655 So.2d 824, 838-39 (Miss. 1995), *cert. denied*, 515 U.S. 1076 (1996); *Conner v. State*, 632 So.2d 1239, 1273 (Miss. 1993), *cert. denied*, 513 U.S. 927 (1994); *Lanier v. State*, 533 So.2d 473, 491-92 (Miss. 1988); *Lockett v. State*, 517 So.2d 1317, 1338 (Miss. 1987), *cert. denied*, 487 U.S. 1210 (1988); *Jones v. State*, 517 So.2d 1295, 1302 (Miss. 1987), *vacated on other grounds*, 487 U.S. 1230 (1988). Further, this is all that is required by *Enmund* and *Tison*.

His further contention is that he could have been sentenced to death of a finding of the fourth intent factor above and the single aggravating factor of "the capital offense was committed during the course of a robbery." Actually, robbery was not involved in this case, it was a burglary. However, the jury did not find the single committed during the commission of a burglary, the jury found four aggravating factors beyond a reasonable doubt in this case. They were:

1. the capital offense was committed for pecuniary gain during the course of a burglary.

2. the capital offense was especially heinous, atrocious, or cruel

3. the capital offense was committed by a person under sentence of imprisonment

4. The capital offense was committed for the purpose of avoiding or preventing a lawful arrest.

State Court Papers at 167-68.

Thus, the factual scenario petitioner paints did not occur in his case. What could have happened is mere speculation.

Included in this portion of the argument seems to be the claim that it is unconstitutional to use the felony that elevates murder to capital murder as an aggravating circumstance. However, the underlying felony that elevates the murder to capital murder may also be used as an aggravating factor. This Court approved the use of such a factor as both a narrowing factor and an aggravating factor in *Tuilaepa v. California*, 512 U.S. 967 (1994), stating:

> Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision. To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one "aggravating circumstance" (or its equivalent) at either the guilt or penalty phase. *See, e.g., Lowenfield v. Phelps*, 484 U.S. 231, 244-246, 108 S.Ct. 546, 554-555, 98 L.Ed.2d 568 (1988); *Zant v. Stephens*, 462 U.S. 862, 878, 103 S.Ct. 2733, 2743, 77 L.Ed.2d 235 (1983). *The*

aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both). Lowenfield, supra, at 244-246, 108 S.Ct., at 554-555.

512 U.S. at 971-72. [Emphasis added]

See Lowenfield v. Phelps, 484 U.S. 231, 244-46 (1988).

Thus, any complaint concerning the use of the aggravating circumstance of the capital offense was committed during the course of a burglary is without merit.

There is no case in controversy presented to this Court and under Article III of the United States Constitution this Court cannot render an advisory opinion. *Herb v. Pitcairn, supra.* Respondent would submit that certiorari must be denied on this claim.

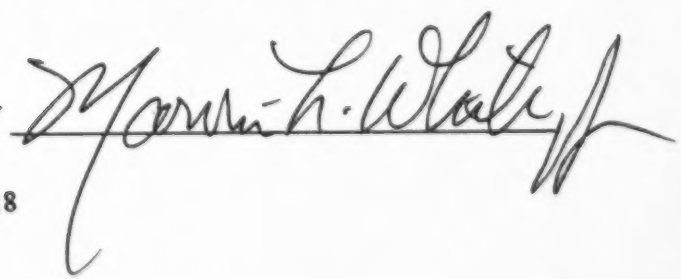
CONCLUSION

Based on the above and foregoing reasons the petition for writ of certiorari attacking the affirmance of the conviction of capital murder and sentence of death by the Mississippi Supreme Court should be denied.

Respectfully submitted,
MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
Counsel of Record

ATTORNEYS FOR RESPONDENT

BY 

CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing **Brief In Opposition** to the following:

André de Gruy, Esquire
510 George Street, Suite 500
Jackson, Mississippi 39202

David M. Ishee, Esquire
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Pascagoula, Mississippi 39568-1027

This the 23rd day of September, 2002.

MARVIN L. WHITE, JR.

OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
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CRIMINAL LITIGATION

OCT 8 1999

SPECIAL PROJECTS

IN THE SUPREME COURT OF MISSISSIPPI

NO. 1998-DP-01782-SCT

BLAYDE GRAYSON A/K/A BLAYDE N. GRAYSON
A/K/A BLAYDE NATHNIEL GRAYSON A/K/A
BLAYDE N. AMODEO — APPELLANT

VERSUS

STATE OF MISSISSIPPI — APPELLEE

APPELLANT'S BRIEF

APPEALED FROM THE CIRCUIT COURT OF GEORGE COUNTY, MISSISSIPPI

ORAL ARGUMENT REQUESTED:

DAVID M. ISHEE
LANG & ISHEE, P.A.
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MS BAR NO. 8370

Appendix I

PUBLISHER'S NOTE:

PAGE(S) MISSING IN ORIGINAL DOCUMENT

George County Jury and the Appellant now appeals the conviction and sentence.

SUMMARY OF ARGUMENT

The Appellant contends that his rights to remain silent as well as his right to effective assistance to counsel were violated by law enforcement officers from the time of his arrest until the time of his inculpatory statements approximately one week later. Thus making all statements made by the Appellant during this period of incarceration as well as all evidence turned over to the State by the Appellant is fruit of the same "poisonous tree" and should not have been submitted into evidence at trial. Furthermore, the Appellant was denied a fair trial and an adequate defense due to the Court's failure to grant the Appellant's Motion for Change of Venue as well as it's Motion for Experts to assist in the Appellant's trial preparation. Furthermore, based on these denials by the trial court the Appellant was unable to properly defend against the death penalty and if these matters are deemed not sufficient to warrant a new trial then the Appellant should be entitled to remand for resentencing.

ISSUE I.

THE TRIAL COURT ERRED IN FAILING TO GRANT THE APPELLANT'S MOTION TO SUPPRESS STATEMENTS GIVEN TO LAW ENFORCEMENT OFFICERS.

In the case at bar, the Appellant was arrested in the State of Florida on unrelated charges on the 17th day of May, 1996. After being interrogated by Florida Authorities on unrelated charges a second round of questioning began at 10:50 P.M. by Sheriff George Miller of the George County Sheriff's Office and Investigator Houston Dorr of the Mississippi Highway

Patrol in relation to this case. This interrogation lasted approximately ten (10) minutes and about a quarter of the way through the Appellant made his first invocation of his right to counsel. What happened at this point clearly shows the spirit and intent of law enforcement officers involved, for despite this invocation of rights Sheriff George Miller continued to interrogate the Appellant despite the Appellant invoking his right to counsel three (3) additional times. Finally, after invoking his right to counsel four (4) times in this interrogation the Appellant's rights were finally respected and the interrogation stopped for that night.

Shortly thereafter, in the pre-dawn hours of the 18th day of May, 1996, the Appellant was transported back to George County, Mississippi where he was placed alone in a cell at the George County Jail. During the next few days the Appellant was subjected to a "jail watch" in which different representatives of the George County Sheriff's Office "checked on" the Appellant every fifteen (15) minutes sometimes waking the Appellant and sometimes simply talking to the Appellant. (See trial transcript pg. 210; R.Ex. 00022)

During this time no attempt was made by law enforcement to secure the Appellant an attorney or get word to the Appellant's former attorney, George County Public Defender, Bill Bailey, that the Appellant was in jail or to give the Appellant an initial appearance either on the charge of escape or on the murder allegations.

During this seven (7) day period the Appellant was taken to George County Hospital, after an Order was obtained from the George County Justice Court to take hair and blood samples from the Appellant. The Appellant was not told any details of how the samples would be dealt with and was left in limbo to sit in jail.

On the 18th day of May, 1996, the Appellant asked to see Sheriff George Miller for

reasons unknown. On Tuesday, the 21st day of May, 1996, the Appellant again requested to see Sheriff George Miller and was taken to the Sheriff's office where the Appellant gave a statement that Jason Kilpatrick committed the murder. The Appellant stated that he and Kilpatrick were visiting George County from Florida and although the statement was not inculpatory as to the commission of the murder the Appellant's statements implicated him as an accessory after the fact. Despite this fact, the Appellant was not given an initial appearance or formally charged or given an opportunity to receive appointed counsel.

On the 23rd day of May, 1996, the Appellant was once again interrogated by Investigator Houston Dorr of the Mississippi Highway Patrol and Sheriff George Miller in which the Appellant again implicated Jason Kilpatrick as the preparator. At this point the Appellant agreed to take a polygraph test at the insistence of Investigator Dorr, but was never told that the results would not be admissible in court or given an opportunity to obtain legal counsel prior to the polygraph examination, nor told that he had a right to refuse the polygraph test.

The following day, the 24th day of May, 1996, the Appellant was transported to the Mississippi Highway Patrol Headquarters in Jackson, Mississippi where a polygraph test was administered. Following the administering of this test by John L. Wagner of the Mississippi Highway Patrol told the Appellant that he was not being truthful and that it would be better on the Appellant if he admitted to the charge. At this time, the Appellant then gave a statement in which he confused to the murder of Minnie Smith. The Appellant contends that this statement was taken in direct violation of his rights under the Fifth and Sixth Amendments of the United States Constitution, as well as Article 3, Section 26 of the Mississippi Constitution, as well as other applicable State and Federal Law.

In a case directly on point, **Abrham v. State**, 606 So.2d 1015 (Miss. 1992), this Honorable Court held that in order for an Appellant's confession to be admissible the confession must be voluntary as well as knowingly and intelligently made. In **Abrham**, as in the case at bar, the Appellant was arrested several days prior to the alleged confession (in **Abrham** the Appellant was incarcerated for only three (3) days, while in this case the Appellant, Grayson, was held for seven (7)) during which time both Appellants were denied an initial appearance as well as access to their court appointed counsel. In both cases, the Appellants denied knowledge of the crime. However, the main difference is that the Appellant in this case specifically refused to talk to law enforcement and ask for an attorney four (4) times during the initial interrogation. The fact that Sheriff George Miller refused to honor the Appellant's Fifth and Sixth Amendment Rights and continued to question the Appellant shows the blatant disregard for proper procedure and lack of respect for the rights of the accused. Furthermore, in both cases neither Appellant was granted an initial appearance or given access to counsel until after the confession was obtained. In addition, both Appellants were held on other charges (**Abrham** was charged with forgery while Grayson was charged with felony escape) as the premise for incarceration and both Appellants had court appointed counsel on those charges.

Additionally, the issue of whether or not the statement was knowingly and intelligently made we must examine the knowledge of the Appellant as well as his state of mind at the time. The United States Supreme Court stated conclusively in **Estelle v. Smith**, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed. 2d 359 (1981), because a laymen may not be aware of the scope or the boundaries of his Fifth Amendment Privilege the assertion of that right often depends upon the legal advice of someone who is trained and skilled in the subject matter. It follows logically

from our precedent that a Defendant should not be forced to resolve such an important issue without the guiding hand of counsel. Furthermore, the United States Supreme Court has specifically ruled in **Maine v. Moulton**, 474 U.S. 159, 106 S.Ct. 477 (1985) as well as **Johnson v. Zerbst**, 304 U.S. 458, 82 L.Ed. 1461 (1938) and **Brewer v. Williams**, 430 U.S. 387 (1977), that it is an obvious fact that the average criminal defendant does not have the professional legal skills to protect himself and the very purpose of counsel is to act as a necessary median between the defendant and the State. In fact, the Court went so far in **Maine v. Moulton** to ask "what use is a defendant's right to effective counsel at every stage of a criminal case if, while he is awaiting trial, he can be questioned in the absence of counsel until he confesses?"

Furthermore, we must look not only to the voluntariness to the confession, but rather or not the confession was given pursuant to a knowing and intelligent waiver of the right to counsel. In **Abrham v. State** the Court stated that a defendant's right to counsel attached once the defendant was (1) taken into custody; (2) at least functionally arrested; and (3) reasonable security measures had been completed. There is no dispute of the fact that the Appellant was taken into custody by Mississippi Law Enforcement Officers on the 17th day of May, 1996, and during initial interrogation invoked his rights under the Fifth and Sixth Amendment. It should once again be noted that it took four (4) times before law enforcement would honor the Appellant's invocation of his right to counsel and stop the interrogation. The Appellant was then held in the County Jail of George County, Mississippi for seven (7) days under a "jail watch" in which he was "checked on" and sometimes awakened every fifteen (15) minutes (See trial transcript page 210; R. Ex. 00022), a tactic widely used to break down an individual's resistance and cloud their reasoning. In addition to sleep deprivation the Appellant was subjected to other

treatment which would serve to intimidate, harass and cloud his judgment.

Three (3) days into his incarceration an Order was obtained from a Justice Court Judge to take hair and blood samples from the Appellant. It should be noted that this would have been an opportunity to grant the Appellant an initial appearance on the escape charge and see that an attorney was appointed, however no such good faith effort was shown. The following day, the Appellant stated to law enforcement that he had knowledge of the crime, but was not the preparator. The Appellant was not charged as an accessory and granted an initial appearance as required by law, but instead was transported the following day to the State of Florida where he was compelled to give evidence that incriminated himself as an accessory. (See trial transcript pg. 186, lines 15-25; R.Ex. 00023).

On the 23rd day of May, 1996, the Appellant was then questioned by Sheriff George Miller and Investigator Houston Dorr in which the Appellant gave the same statement as May 21 and May 22, 1996. However, Investigator Dorr then requested that the Appellant submit to a polygraph examination, but neglected to tell the Appellant that this was not mandatory nor were the results admissible to be used against the Appellant in Court. On the 24th day of May, 1996, the Appellant's eighth (8th) day in jail, he was transported to Jackson, Mississippi where he was given a polygraph examination. At no time did anyone, including the administrating agent, tell the Appellant he was not compelled to submit to this exam nor were the results admissible in Court. In fact, after the examination the administrating agent told the Appellant that he knew he was not telling the truth and then made coercive statements to get the Appellant to change his story. (See trial transcript pg. 308-310; R.Ex. 00024-00026).

The question is thus raised, how can a criminal defendant waive his rights if, once those

rights are specifically invoked, law enforcement continues to question and harass the defendant until he makes an inculpatory statement? Secondly, how can a waiver be knowingly and intelligently made if the defendant is denied access not only to an attorney, but also to the court system, as well as being deprived of sleep and harassed for over a week and not explained his right to refuse a polygraph examination or informed of its inadmissibility in court and told coercive statements by an "expert" representing the State?

The State through Sheriff George Miller has tried to get around the interference of the Sixth Amendment by stating that Appellant asked for "his attorney", (See trial transcript pg. 185-186, lines 15-8; R.Ex. 00027-00028) rather than asking for an attorney in general. This Court should readily see that such a mincing of words is nothing more than a blatant attempt to circumvent the Bill of Rights.

If we assume that in fact the Appellant wanted to see "his" attorney, the Appellant had been previously represented on other charges by the George County Public Defender (part time office), how could the Appellant be expected to contact the part-time Public Defender while in jail and given only limited access to a telephone. Considering that law enforcement took the Appellant to the hospital for blood and hair samples pursuant to an Order in which law enforcement had obtained across the street from the jail at the Justice Court, law enforcement also took the Appellant across two (2) State lines to assist with their investigation, yet law enforcement could not take the Appellant across the street to the Public Defender's office or notify the Public Defender of the Appellant's incarceration considering that the Public Defender was a part time agency and the Appellant would have difficulty contacting them shows the spirit and lack of respect for the Appellant's Constitutional Rights with which law enforcement acted.

STATE OF MISSISSIPPI

OFFICE OF THE ATTORNEY GENERAL

MIKE MOORE
ATTORNEY GENERAL

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
CAPITAL LITIGATION DIVISION

September 23, 2002

Honorable Chris Vasil
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Re: *Grayson v. Mississippi*, No. 01-10192.

Dear Chris:

Enclosed for filing please find the original and ten (10) copies of Respondent's BRIEF IN OPPOSITION in the above styled and numbered cause. By copy of this letter I am serving counsel opposite. This case became confused with another and was filed under another case name, thus the lateness of the response. Thank you for your assistance in this matter.

With best wishes, I am

Sincerely,

Marvin L. White, Jr.
Assistant Attorney General

MLW/mlw
Enclosures

cc: André de Gruy, Esquire
David M. Ishee, Esquire

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